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Docket No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1996

ANNE L. ALLEN, a/k/a NANCY ALLEN, an incompetent, by ANNE M. ALLEN, her guardian, and ANNE M. ALLEN, in her own right and as personal representative of WALTER E. ALLEN, her deceased husband,

Petitioners,

v.

MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR WRIT OF CERTIORARI

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109 pp

QUESTION PRESENTED FOR REVIEW

Does a state statute denying mentally ill persons the right to sue when the medical care provided to them is negligent, but allowing all others the right to sue for negligent medical care, deny mentally ill persons equal protection of the laws in violation of the fourteenth amendment to the United States constitution?

Parties to the proceedings in the Supreme Court of Pennsylvania:

Appellees in that court:

Anne L. Allen, also known as Nancy Allen, an incompetent.

Anne M. Allen, the mother and guardian of Nancy Allen.

Walter E. Allen, the now-deceased father and guardian of Nancy Allen.

Appellants in that court:

Montgomery Hospital.

Paul R. Casey, Jr., M.D.

Petitioners are individuals and need make no corporate disclosure under rule 29.6.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed herein was entered by the Supreme Court of Pennsylvania on June 17, 1997. This court has jurisdiction to review the judgment in question on a writ of certiorari under 28 U.S.C. § 1257 (1994).

The notification required by rule 29.4(c) has been made to the Hon. D. Michael Fisher, Attorney General of Pennsylvania. Because the constitutionality of a Pennsylvania statute is drawn into question in this proceeding, 28 U.S.C. § 2403(b) (1994) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 102 of Pennsylvania's Mental Health Procedures Act:

> It is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, and it is the purpose of this act to establish procedures whereby this policy can be effected. The provisions of this act shall be interpreted in conformity with the principles of due process to make voluntary and involuntary treatment

> available where the need is great and its absence could result in serious harm to the mentally ill person or to others. Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed. Persons who are mentally retarded, senile, alcoholic, or drug dependent shall receive mental health treatment only if they are also diagnosed as mentally ill, but these conditions of themselves shall not be deemed to constitute mental illness . . . .

Pa. Stat. Ann. tit. 50, § 7102 (Supp. 1997).

Section 114(a) of Pennsylvania's Mental Health Procedures Act:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer, or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.

Pa. Stat. Ann. tit. 50, § 7114(a) (Supp. 1997).

STATEMENT OF THE CASE

Petitioner Nancy Allen, who was diagnosed as being mentally retarded with severe psychosis, was admitted to Norristown State Hospital on August 11, 1980, pursuant to Pennsylvania's Mental Health Procedures Act ("MHPA"). Two years later, she began suffering from a fever and dehydration, and was admitted on November 30, 1982, to Montgomery Hospital, a general hospital (and a respondent herein). There she was treated by Paul R. Casey, Jr., M.D., for her physical ailments. Dr. Casey (the other respondent herein) is an internist, not a psychiatrist, and he treated Nancy Allen for her physical ailments. Appendix to the Petition (hereinafter "Pet. App.") 17a; Pa. Supreme Ct. Reproduced Record (hereinafter "R.") 188a, 192a, 194a, 203, 220-221a.

Although there were psychiatrists on staff at Montgomery Hospital, Dr. Casey never consulted them or the psychiatrists at Norristown State Hospital during Nancy Allen's stay at Montgomery. Although Montgomery Hospital had a psychiatric wing and psychiatric nurses, Nancy Allen was treated on a general medical-surgical floor and attended by regular nurses. And although the Mental Health Procedures Act in question here requires an individualized treatment plan developed by a multi-purpose team, no such plan was created or implemented for Nancy Allen by either respondent. Indeed, Dr. Casey testified that he was unaware of any provisions of the MHPA. Pet. App. 17a; R. 183a-185a, 232a-233a, 388a-389a.

On the day of Nancy Allen's admission to Montgomery Hospital, a nurse restrained her by applying a Posey vest restraint, and she remained so restrained (except for personal care, such as cleaning her and changing bed linens) until after the time of the accident giving rise to this

cause.[1] The Posey restraint was the same as commonly used at Montgomery Hospital to restrain patients who have no psychiatric problems at all. Dr. Casey testified that Posey chest restraints are frequently used on elderly patients who are confused or on disoriented patients. No Posey restraint was in use by Norristown State Hospital when Ms. Allen was admitted to Montgomery Hospital. Pet. App. 17a; R. 12a-13a, 25a, 34a, 207a, 240a-241a.

With Nancy Allen kept in restraints full-time, alone in a room far from the nurses' station, and without any set schedule for her to be checked by the nurses, she was found by a nurse at 2:00 a.m. on December 5, 1982, half on and half off the bed, with the Posey restraint entangled around her neck. The straps on the vest were still fastened to the bed rails, and her weight was being held off the floor by the vest wrapped around her neck. This caused strangulation resulting in loss of oxygen to her brain. Compounding the damage, the nurse who found Nancy Allen did not cut away the vest or take any other action immediately to secure an open airway. Instead, the nurse left her hanging from the restraint, ran out of the room and down the hall, and then returned to the room. With the aid of another nurse, she untied Nancy Allen, and CPR was eventually begun. Nancy Allen survived, but sustained hypoxic encephalopathy resulting in severe brain damage which persists to this date; she is now confined to the Lynch Home, a total care facility in Lower Gwynedd, Montgomery County, Pennsylvania. Pet. App. 17a-18a; R. 14a, 26a, 38a, 155a-162a.

Petitioner Anne M. Allen and her deceased husband, Walter E. Allen, in their capacity as guardians of

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[1] "A [P]osey restraint is a vest-like garment which is tied to the patient's bed in order to keep the patient from falling out of bed, but allows the patient to move his or her arms and to sit up in bed." Pet. App. 2a n.1.

Nancy Allen and on their own behalf, sued respondents in the court of common pleas of Montgomery County, Pennsylvania, alleging negligence.[2] R. 9a. Because Nancy Allen had been admitted to Norristown State Hospital under the MHPA and had been there until her admission to Montgomery Hospital for treatment of her physical ailments, the respondents moved *in limine* for a ruling that section 114 of the MHPA (set out *supra* at 2) immunized them from liability for treatment decisions unless petitioners proved gross negligence or willful misconduct.[3] R. 76a. Petitioners asserted both statutory and constitutional arguments against the motion *in limine*, but the trial court held that section 114 applied.[4] After being instructed that it would have to find gross negligence in order to impose liability (willful misconduct was not alleged), a jury returned a defense verdict. R. 397a-400a; 428a. After denial of post-trial motions and entry of judgment for the respondents, petitioners appealed.[5] The Superior Court of

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[2] Respondent Montgomery Hospital joined Norristown State Hospital as an additional defendant, but that party was later dismissed from the action by the consent of all parties in the common pleas court. In addition, other parties were joined as additional defendants, but none of them were parties in the Superior Court or Supreme Court of Pennsylvania.

[3] On the same day it decided the present case, the Supreme Court of Pennsylvania decided in another case "what constitutes 'gross negligence' for purposes of" section 114: "more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. . . . The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." Pet. App. 67a, 74a (*Albright v. Abington Memorial Hospital*, No. 31 E.D. Appeal Docket 1996 (filed June 17, 1997)).

[4] The federal questions herein were raised by petitioners at pages 26-29 of their memorandum in opposition to the respondents' motion in limine. Common Pleas Judge Ott's opinion deciding the motion *in limine* did not address the federal question, Pet. App. 57a-62a, and Common Pleas Judge Nicholas simply held that pre-trial he was bound by Judge Ott's order. R. 115a-117a.

[5] The federal questions herein were pressed again in petitioners' post-trial motions. R. 431a-432a. Judge Nicholas rejected the

Pennsylvania agreed with petitioners that section 114 did not apply to the medical, non-psychiatric, treatment provided in this case, and ordered a new trial.[6] Respondents then appealed to the Supreme Court of Pennsylvania, which reversed and held that section 114 did apply, "conclud[ing] that the General Assembly decided to ameliorate certain risks by granting limited immunity to doctors and hospitals who have undertaken the treatment of the mentally ill, including treatment for physical ailments pursuant to a contract with a mental health facility to provide such treatment."[7] Pet. App. 8a. In doing so, the court adopted a very broad, potentially boundless, definition of "treatment" which would occasion immunity under section 114. Pet. App. 7a-8a (treatment includes "medical care coincident to mental health care"; and "treatment under the MHPA broadly includes 'care and other services that supplement treatment'"). That court rejected petitioners' equal protection claim in a footnote. Pet. App. 9a n.7.[8]

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[5] continued from previous page. . .
petitioners' federal claims in his opinion denying post-trial relief. Pet. App. 46a-50a. Petitioners included the federal claims at pages 39-41 of their brief to the Superior Court of Pennsylvania.

[6] That court held in favor of the petitioners' statutory interpretation claims, and therefore noted that it did not address the remaining claims, including the federal claims. Pet. App. 25a. Judge Brosky of that court, however, would have affirmed and therefore did address the federal claims. Pet. App. 38a-42a.

[7] Petitioners presented their federal claims at pages 36 and 40-43 of their brief to the Supreme Court of Pennsylvania.

[8] Justice Nigro of that court would have affirmed the Superior Court and thus did not need to address the federal constitutional questions. Pet. App. 11a-14a.

ARGUMENT

Introduction

Pennsylvania's Mental Health Procedures Act ("MHPA"), as applied to petitioners by that state's supreme court, provides a lower standard of care for mentally ill patients than for all other patients. In doing so, Pennsylvania has classified mentally ill persons disadvantageously, in violation of the fourteenth amendment to the United States constitution. Petitioners are entitled to have their claims scrutinized by a strict -- or at least heightened -- standard of review, but even if such a heightened standard is not applied, Pennsylvania's classification is without any rational basis and must be invalidated by this court.

The requirements of the equal protection clause

The equal protection clause has traditionally been understood to require that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Most economic and social regulation is reviewed deferentially by the courts, requiring only that the classification "bea[r] a rational relation to some legitimate end." *Romer v. Evans*, 116 S. Ct. 1620 (1996). However, this court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982) (footnotes omitted). Such classifications "requir[e] the State to demonstrate that its classification has been narrowly tailored to serve a compelling governmental interest." *Id.* at 217. Certain other classifications which "give rise to recurring constitutional difficulties" require proof that the law furthers a "substantial interest of the State." *Id.* at 218 & n.16 (describing "intermediate" scrutiny).

Even in the absence of a suspect class or an impingement upon a fundamental right, intermediate scrutiny, or some other heightened scrutiny, may still apply, requiring a substantial relation to a sufficiently important state interest. In three recent cases, this court has explored the contours of equal protection analysis and the standard by which such claims are to be reviewed. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this court invalidated a Texas city's zoning ordinance restricting where a group of mentally retarded adults could live. In that decision, the court considered the reasons proffered by the city for its ordinance and unanimously held that the city failed to carry its burden of demonstrating that the ordinance was rationally related to any legitimate governmental purpose. Five justices, however, wrote in two separate concurring opinions that they believed that the rigid, three-tiered system described above (strict scrutiny, heightened scrutiny or intermediate review, and rational-basis review) inadequately described the process by which this court had historically (including the *City of Cleburne* case) reviewed equal protection claims. Two justices held that the traditional three tiers were actually all part of one continuum, essentially arguing that the more irrational the classification (race or gender, for example), the more likely that no state interest could ever be legitimate or strong enough to sustain it. *Id.* at 451, 451-55 (Stevens, J., concurring). Three justices were more pointed, making the same assessment but remarking both that if the standard being applied was "rational-basis review," as stated by the opinion of the court, then under the language of any ordinary case applying rational basis review to an economic or social law, the law would have been upheld, and that what was really being applied was some sort of "'second order' rational-basis review." *Id.* at 455-473 (Marshall, J., concurring).

Eight years later, this court decided *Heller v. Doe*, 509 U.S. 312 (1993). There, eight justices left open the question whether any heightened standard of review applied to equal protection claims brought by the mentally retarded, but for different reasons. The opinion of the court stated that the question had not been properly presented, and then held that under ordinary rational-basis principles, the statute (providing slightly different commitment procedures for mentally retarded persons than for mentally ill persons) served a legitimate state interest in that it gave more protection to those alleged to be mentally ill, a sometimes fleeting condition thought by the court to be less susceptible of clear proof than mental retardation, a supposedly less controversial developmental and long-term condition. *Id.* at 319-328. Three other justices dissented from the court's approval of the classification, and because they would have invalidated the statute even on rational-basis review, did not need to address the additional question of whether such claims deserved a heightened level of scrutiny. *Id.* at 335-37 (Souter, J., dissenting). Justice Blackmun wrote separately that he would have applied heightened scrutiny. *Id.* at 334-35.

Then, in 1996, this court struck down a Colorado constitutional amendment using rational-basis analysis and language. *Romer v. Evans*, 116 S. Ct. 1620 (1996). The first point to be made concerning the appropriate analysis and burden of proof is that the court considered Colorado's articulated justifications for the amendment but rejected them, and did not go out of its way to identify other possible rationales, as the *Heller* opinion did. *Compare id.* at 1629 ("The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them") *and City of Cleburne*, 473 U.S. at 449 ("it is difficult to believe" the zoning law's asserted premises) *with Heller v. Doe*, 509 U.S. at 320 ("a classification 'must be upheld against equal protection challenge if there is any

reasonably conceivable state of facts that could provide a rational basis for the classification.'") (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 302, 313 (1993)). The next point is that several of the court's statements in *Romer v. Evans* apply with equal force to the present case: "The amendment withdraws from homosexuals, but no others, specific legal protection . . . ," *Romer v. Evans*, 116 S. Ct. at 1625; "Amendment 2 bars homosexuals from securing *protection against the injuries* that these public-accommodations laws address. That in itself is a severe consequence . . . ," *id.* at 1626 (emphasis added); "[T]he amendment imposes a special disability upon those persons alone. Homosexuals are *forbidden the safeguards* that others enjoy or may seek without constraint." *id.* at 1627 (emphasis added); "These are protections taken for granted by most people either because they already have them or do not need them . . . ," *id.*; "[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group . . . ," *id.*; "[Amendment 2] identifies persons by a single trait and then denies them protection across the board," *id.* at 1628; "A law declaring that in general it shall be *more difficult for one group of citizens than for all others to seek aid from the government* is itself a denial of equal protection." *id.* (emphasis added).

Pennsylvania's classification burdens a fundamental right and therefore is subject to strict scrutiny

In this case, Pennsylvania has established a double standard: for ordinary people with a physical ailment, the standard of care required of medical professionals includes the familiar duty to exercise the care and judgment of a reasonable person, *Smith v. Yohe*, 194 A.2d 167 (Pa. 1963), but for the mentally ill who become physically ill, a much lower standard of care will suffice. For them, a doctor or hospital need not take care; need not do what a reasonable

person of ordinary prudence would do concerning his patients; need not observe elementary safety and security precautions; indeed, Pennsylvania has informed those who are even tangentially related to caring for the mentally ill in that commonwealth that they may be "careles[s], inadverten[t], la[x], or indifferen[t]." Pet. App. 74a (*Albright v. Abington Memorial Hospital*, No. 31 E.D. Appeal Docket 1996 (filed June 17, 1997)).

As a matter of Pennsylvania law, as long as such a physician or hospital can later persuade a judge that a jury should not conclude that its conduct was not "egregiously deviant" or "flagrant, grossly deviating from the ordinary standard of care," it will succeed in keeping such claims even from reaching a jury. Pet. App. 74a (*Albright v. Abington Memorial Hospital*, No. 31 E.D. Appeal Docket 1996 (filed June 17, 1997)). Moreover, the facts in *Albright* make clear that proving gross negligence under the MHPA is a well-nigh-insurmountable hurdle. The Supreme Court of Pennsylvania there held that no reasonable juror could find the sort of gross negligence that would satisfy Pennsylvania law even where a patient killed herself in a fire after a hospital repeatedly ignored warnings of her deteriorating mental state, declined to commit her when she missed necessary outpatient medication and therapy sessions, ignored warnings that she was becoming manic, chain-smoking, and leaving cigarette burns in a couch, and refused to attempt an inpatient — commitment because her outpatient commitment was almost expired. Pet. App. 67a-70a; 82a-83a.

In the present case, where a mentally ill patient (initially admitted to a state hospital under the MHPA) and her family alleged negligence in the medical care she received from a different hospital and an internist but were denied the opportunity to have a jury decide that claim, they have been denied a fundamental right in our society -- the right to bodily

integrity, the right to be free from inhumane confinement, and the right to sue in court when the underlying rights have been violated. *Youngberg v. Romeo*, 457 U.S. 307 (1982). In that case, after repeatedly emphasizing that Pennsylvania conceded that involuntarily committed mentally retarded persons have a constitutional right to adequate food, shelter, clothing, and medical care, *id.* at 315, 324, the court further held that such persons "enjo[y] constitutionally protected interests in conditions of *reasonable* care and safety [and] *reasonably* nonrestrictive confinement conditions . . . ." *Id.* at 324 (emphasis added); *see also id.* at 315 ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause") (citation omitted); *id.* at 316 ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (citation omitted). Of course, the test for reasonableness is the essence of a negligence claim, the very standard denied to the petitioners by section 114 of the MHPA.

Three of the rights recognized in *Youngberg* -- medical care, safety, and freedom of movement -- are to varying degrees the same ones infringed in the present case. And because they are constitutionally protected as substantive rights under the due process clause, they are fundamental rights for purposes of equal protection analysis. *City of Cleburne*, 473 U.S. 4432, 440 (strict scrutiny "is due when state laws impinge on personal rights protected by the Constitution"); *Plyler v. Doe*, 457 U.S. 202, 217 n.5 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.").

Similarly, the right to sue for violations of these underlying rights is fundamental, because it provides the

means to remedy the violation in the same way that voting in state elections, though not mentioned in the Constitution, is the means by which citizens can protect other fundamental rights. *Id.* ("With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights.") (citations omitted). Justice Blackmun amplified this explanation:

> [R]egulation of the electoral process receives unusual scrutiny because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

Plyler v. Doe, 457 U.S. 231, 233 (Blackmun, J., concurring) (footnote omitted.

Analogously, Pennsylvania's decision to deny mentally ill persons the right to sue for negligent medical care, while providing that right to all others, relegates the mentally ill "in a most basic way to second-class status" in violation of the equal protection clause. The Pennsylvania Supreme Court's failure to apply strict scrutiny to petitioner's claims was therefore error and should be reviewed by this court. When the claim is reviewed under this standard, it is apparent that it is far from narrowly tailored to meet the asserted goal

of making mental health care available, Pet. App. 7a-8a (extending immunity to broad range of physical treatment), and not closely related to any compelling government interest.

In the alternative, petitioners were entitled to heightened scrutiny of Pennsylvania's classification of the mentally ill

But even if strict scrutiny need not have been applied, petitioners were entitled to intermediate review or heightened scrutiny because of the historic prejudice against the mentally ill. In fact, the Pennsylvania Supreme Court apparently recognized that this was the proper standard. Pet. App. 9a n.7 (using phrase "substantial government interest" in defense of section 114 of MHPA); *see Plyler v. Doe*, 457 U.S. 202, 218 & n.16 (1982) (intermediate review requires proof that the law furthers a "substantial interest of the State"). Despite that court's use of the appropriate text, however, it did not in fact conduct a very searching inquiry, nor articulate how the asserted purpose of the MHPA ("to make . . . treatment available", Pa. Stat. Ann. tit. 50, Sec. 7102 (Supp. 1997)) is substantial or how it is furthered by denying standard medical care to mentally ill patients with physical ailments. Therefore, this too was error, and requires review by this court to answer the question left open by *Heller v. Doe.*

Pennsylvania's classification has no rational basis

Finally, even if no formally elevated tier of review is applied, the inquiry required by *City of Cleburne* and *Romer v. Evans*, if properly applied to this case, would insist on knowing just what interest Pennsylvania advances in denying mentally ill persons the right to non-negligent care for their medical needs, and the right to seek redress in the courts under the same standards applied to all other citizens. "[E]ven in the ordinary equal protection case . . . we insist on

knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; . . . ." *Romer v. Evans*, 116 S. Ct. 1620, 1627. As noted above, the only purpose Pennsylvania has articulated is "to make . . . treatment available," and the state supreme court's opinion did not expand on that rationale. The "search for the link" here is unavailing, for Pennsylvania has, as a matter of statutory interpretation, held that its classification extends to all physical care of all persons subject to the MHPA; even if Pennsylvania had some interest in denying mentally ill persons the right to a non-negligent commitment decision (so that front-line decision-makers such as police officers or emergency room staff would not shirk from making difficult initial decisions about whether to commit or not), that interest cannot possibly extend to the point of denying such persons non-negligent medical care forever and ever. It is "impossible to credit," *Romer v. Evans*, 116 S. Ct. at 1629, the claim that a physician who admitted that he was unaware of the MHPA was motivated to treat petitioner Nancy Allen by that act's immunity.

Conclusion

This case provides an opportunity for the court, if its analysis is not earlier terminated by the impingement on fundamental rights, to integrate the standards identified in *City of Cleburne* and *Romer v. Evans* with the apparently inconsistent holding of *Heller v. Doe*. Some commentators have suggested that the difference may lie in the character of the classification: in *City of Cleburne* and *Romer v. Evans*, where the laws were invalidated, the classification was of an insular minority against the world; in *Heller*, the classification was of one minority against another similarly situated one. *See* Jennie S. Stinebaugh, *Heller v.*

Doe: The Rational Basis Review Guessing Game, 25 U. Memphis L. Rev. 329, 347-49 (1994).

Indeed, on the merits, it seems apparent that *Romer v. Evans* alone would require the reversal of the Pennsylvania Supreme Court in this case. But on the preliminary question of whether this court ought to grant certiorari initially, the confusion left in the field of mental health by *Heller v. Doe*'s result and its silence with respect to its relation to *City of Cleburne*, *see Heller v. Doe*, 509 U.S. at 335, 337 (Souter, J., dissenting) ("at the end of the day *Cleburne*'s status is left uncertain") suggest that this court should grant certiorari here to make clear that the analysis of *Romer v. Evans* reaffirmed the *City of Cleburne* approach to all cases in which an identifiable minority class is disadvantaged in comparison to the world at large, and that the mentally ill are either entitled to some level of heightened scrutiny, or at least to a rational basis analysis that follows the spirit and thoroughness of *City of Cleburne* and *Romer v. Evans*.

This case warrants review and reversal by this court because of the importance of the questions presented on the status and rights of the mentally ill to be treated as full citizens and members of our society. If the Pennsylvania decision is allowed to stand, petitioners and others subject to the MHPA will be unable to protect themselves from shoddy medical procedures -- not simply the negligent supervision and similar claims presented in this case, but also negligent surgeries, negligent use of force, negligent medication, and other serious infringements on the right of free citizens which all other citizens may redress by an action for negligence.

If a patient had suffered this same injury at the hands of the same physician and hospital, but was merely elderly or disoriented from medication or fever, that patient

would have the right to sue on the theory that those injuries were caused by negligent care. Pennsylvania denies that right to petitioners, and does so for one reason: because Nancy Allen was also mentally ill in addition to having physical ailments. This difference denies to mentally ill persons the equal protection of the laws.

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[J-202-1996]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT,BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	Nos. 0036 & 0037 E.D. Appeal Dkt. 1996
Appellees,	:	Appeal from the Judgment of the Superior Court entered on December 19, 1995 at 3129PHL94 reversing the order entered on August 18, 1994 and remanding to the Court of Common Pleas, Montgomery County, Civil Division at 83-16964.
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	447 Pa. Super. 158, 668 A.2d 565 (1995)
Appellants.	:	ARGUED: October 17, 1996.

OPINION OF THE COURT

MR. JUSTICE CASTILLE DECIDED: June 17, 1997

The sole issue on appeal is whether the immunity provisions of the Mental Health Procedures Act, 50 P.S. § 7101, et seq., apply to hospitals and doctors who provide medical care to a mentally ill patient pursuant to a contract with a mental hospital. Because we hold that the immunity provisions of the Mental Health Procedures Act apply to doctors and hospitals in such a situation, we reverse the order of the Superior Court and reinstate the order of the trial court entering judgment in favor of appellants on the verdict of the jury.

The relevant facts are that on August 11, 1980, appellee Anne L. Allen ("the patient") was admitted for in-patient treatment

at Norristown State Hospital for treatment of mental retardation and psychosis after she suffered an adverse reaction to her medication that made it difficult for her parents to control her behavior. On November 30, 1982, the patient was transferred to Montgomery Hospital for treatment of certain physical ailments pursuant to a contractual agreement through which Montgomery Hospital would provide medical treatment for mental patients from Norristown State Hospital. Dr. Paul Casey, Jr., was the patient's attending physician at Montgomery Hospital. The initial diagnosis was that the patient was suffering from dehydration and a fever. The patient was admitted to a private room on the orthopedic floor of Montgomery Hospital.

Suspecting the patient's physical problems were caused by a reaction to medication prescribed for her mental problems, Dr. Casey removed the patient from all but one of her prescribed psychotropic drugs. While hospitalized at Montgomery Hospital, the patient was kept in a posey vest restraint.[1] A posey restraint had also been employed to secure the patient at Norristown State Hospital in the weeks prior to her transfer to Montgomery Hospital. The patient's physical condition improved following her treatment and she was scheduled to be returned to Norristown State Hospital on December 6, 1982. However, on December 5, 1982 at 2:00 a.m., a nurse at Montgomery Hospital discovered the patient hanging about six (6) inches above the floor between the side-rails and her bed with the posy [sic] restraint around her neck. The patient had managed to free one arm from the restraint and had apparently attempted to get out of the bed. The nurse called for aid in freeing the patient from the restraint and administered cardio-pulmonary resuscitation. The patient survived but tragically suffered permanent brain damage due to lack of oxygen.

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[1] A posey restraint is a vest-like restraint which is tied to the patient's bed in order to keep the patient from falling out of bed, but which allows the patient to move his or her arms and to sit up in bed.

On November 11, 1984, the patient's parents filed a complaint against Montgomery Hospital and Dr. Casey (collectively, the "appellants") for medical negligence.[2] Appellants filed a Motion in Limine requesting that the immunity provisions of the Mental Health Procedures Act (MHPA), 50 P.S. § 7101, et seq., be applied to the proceedings. Specifically, appellants claimed that they were immune from liability under Section 114 of the MHPA, 50 P.S. § 7114, unless their actions in treating the patient were found to constitute willful misconduct or gross negligence. The trial court granted the motion and certified the issue for interlocutory appeal to the Superior Court. However, the Superior Court declined to accept the appeal, and this Court denied *allocatur*. 530 Pa. 659, 609 A.2d 167 (1992).

The case then proceeded to trial, and the jury was instructed, pursuant to the MHPA, that a verdict could only be entered in favor of appellees if the jury found that appellants' actions in treating the patient amounted to gross negligence.[3] The jury returned a verdict in favor of appellants because it found that neither of appellants were grossly negligent in their treatment of the patient. Appellees filed post-trial motions which were denied. Appellees then filed a timely appeal. On December 19, 1995, a three Judge panel of the Superior Court, with one judge dissenting, reversed and remanded the matter for a new trial because it held that the trial court erred in determining

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[2] Several distributors of posey restraints were also initially named as defendants, but summary judgment was entered in their favor prior to trial. Norristown State Hospital was joined as an additional defendant by Montgomery Hospital, but non-suit was entered in favor of Norristown State Hospital following the close of appellees' case.

[3] Appellees' complaint never alleged that appellants' actions amounted to willful misconduct. Thus, the trial court did not mention willful misconduct when instructing the jury on the immunity provision in Section 114 of the MHPA.

that the immunity provisions of the MHPA applied.[4] On May 29, 1996, we granted *allocatur* in order to decide if the immunity provision found in Section 114 of the MHPA, 50 P.S. § 7114, applies to physicians and doctors and hospitals who provide medical care for a physical ailment to a mental patient pursuant to a contract with a mental health care facility.

Appellees argue that Section 114 of the MHPA does not provide appellants with immunity because it only applies to treatment which is specifically directed to treating the patient's mental illness and not to treatment for physical ailments. Appellants, however, argue that the immunity provision of the MHPA applies to hospitals and doctors who provide medical care for physical ailments to mental patients pursuant to a contract with a mental health facility. Our determination of which interpretation is correct depends upon our analysis of the controlling statutory language.

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[4] The majority of the Superior Court reached its decision by recognizing that the immunity provisions of the MHPA have only been applied to psychiatrists and no other medical care providers. Also, the majority found that the immunity provisions of the MHPA have never been applied to anyone, including psychiatrists, for treating a mentally ill patient for a physical ailment. Moreover, the majority found that psychiatrists only have received immunity under the MHPA when the issue involves the level of supervision or restraint necessary to protect the patient. Therefore, the majority reasoned that appellants here were not entitled to immunity because they provided care for a physical ailment rather than a mental illness and the claims raised did not involve the restraints used or supervision supplied to the patient.

The dissent, however, would have applied the immunity provisions of the MHPA. In doing so, the dissent argued that mental illness is often manifested from physical problems. Also, the patient's physical ailments and mental illness were both treated by appellants. Moreover, the dissent believed that the proper focus in analyzing such an issue should be on whether the treatment administered to the mentally ill patient falls within the scope of conduct for which immunity is granted.

When reviewing a statute, we are guided by the Statutory Construction Act. See 1 Pa. C.S. § 1501 *et seq*. The object of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly. 1 Pa. C.S. § 1921(a). When ascertaining the legislative intent, it is presumed that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable. Also, if possible, the statute must be construed to give effect to all of its provisions. Id. Moreover, the provisions of a statute must be liberally interpreted to effect its object and to promote justice. 1 Pa. C.S. § 1928 (b) (providing that statutes which do not fall within the classes of statutes established in subsection (b), none of which apply here, shall be liberally construed).[5]

In 1976, the General Assembly enacted the MHPA to provide procedures and treatment for the mentally ill in this Commonwealth. The policy of the MHPA is set forth in Section 102, which provides, in pertinent part:

> [I]t is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, and it is the purpose of this act to establish procedures whereby this policy can be effected. The provisions of this act shall be interpreted in conformity with the principles of due process to

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[5] The Superior Court has strictly construed certain provisions of the MHPA which concern the deprivation of a liberty interest or a privacy right. See In re: S.C., 280 Pa. Super. 539, 421 A.2d 853 (1980) (involuntary commitment pursuant to 50 P.S. § 7303(b) implicated a liberty interest requiring strict construction of that section); In the Interest of Roy, 423 Pa. Super. 183, 620 A.2d 1172 (1993), *appeal denied*, 536 Pa. 644, 639 A.2d 30 (1994) (50 P.S. § 7111, which relates to confidentiality of patient's records, must be strictly construed). This Court, however, employed a liberal construction in Farago v. Sacred Heart General Hospital, 522 Pa. 410, 562 A.2d 300 (1989), when determining that hospitals were a person covered by the immunity provision of Section 114 of the MHPA.

> make voluntary and involuntary treatment available where the need is great and its absence could result in serious harm to the mentally ill person or to others. Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed.

50 P.S. § 7102.

Consistent with this policy to insure adequate treatment to mentally ill individuals in the least restrictive environment, the MHPA provides civil and criminal immunity for decisions regarding the treatment of the patient absent willful misconduct and/or gross negligence. Farago v. Sacred Heart General Hospital, 522 Pa. 410, 414, 562 A.2d 300, 302 (1989). The relevant statutory language regarding this immunity is found in Section 114 of the MHPA and provides, in pertinent part, that:

> [I]n the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer, or any other authorized person who participates in a decision that a person be examined or treated under this act, or that the person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be reduced, or a county administrator or person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.

50 P.S. § 7114(a) (emphasis added). Montgomery Hospital is a person within the meaning of this section. Farago, *supra* at 419, 562 A.2d at 303 (hospital qualifies as person subject to immunity under Section 114 of the MHPA). Thus, if appellants participated in the

decision to provide treatment to the patient under the MHPA, the immunity provision of Section 114 of the MHPA applies to them.

Section 114 of the MHPA does not specifically define what is encompassed within the term "treated." However, definitions of "treatment" and "adequate treatment" can be found elsewhere in the MHPA. In particular, the MHPA provides as follows:

> Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness. It shall be provided to all persons in treatment who are subject to this act. It may include inpatient treatment, partial hospitalization, or outpatient treatment. Adequate inpatient treatment shall include such accommodations, diet, heat, light, sanitary facilities, clothing recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions.
>
> Treatment shall include diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery.

50 P.S. § 7104 (Provision for Treatment) (emphasis added).

The above provisions demonstrate a clear public policy by the General Assembly to make adequate treatment available to mentally ill patients with the least restrictions to their person. Moreover, as is evident from the General Assembly's definition of "adequate treatment" and "treatment" in the MHPA, the General Assembly did not intend to limit treatment to that only directly related to a patient's mental illness. Instead, treatment is given a

broader meaning in the MHPA to include medical care coincident to mental health care. Medical care is commonly understood to include the prevention or alleviation of both physical and mental illness. *See* 1 Pa. C.S. § 1903(a) (courts must construe statutory terms not defined in statute in accordance with their common usage). Also, treatment under the MHPA broadly includes "care and other services that supplement treatment" in order to promote the recovery of the patient from mental illness. Therefore, applying the rules of statutory construction to the immunity provision of Section 114 of the MHPA, we conclude that the General Assembly decided to ameliorate certain risks by granting limited immunity to doctors and hospitals who have undertaken the treatment of the mentally ill, including treatment for physical ailments pursuant to a contract with a mental health facility to provide such treatment.

Policy reasons also support this interpretation of the immunity provision in Section 114 of the MHPA. If the provision were interpreted narrowly such as urged by appellees so that it only applied to treatment specifically directed at a mental illness, it could reduce or eliminate the willingness of doctors or hospitals to provide needed medical care to a mentally ill patient who is referred by a mental hospital for medical treatment. Even if doctors or hospitals still provided treatment for physical ailments in such a situation, it could lead such providers of medical care to minimize their risks by placing the mentally ill patients in a more restrictive environment than is necessary or adopting other precautionary measures which would increase the costs of the medical care provided to the mentally ill. Such a narrow interpretation would clearly contravene the purposes of the MHPA to provide adequate treatment to the mentally ill with the least restrictive physical restraints.[6]

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[6] We note that the dissenting opinion agrees with the narrow position taken by the appellees. However, like the appellees, the dissenting opinion ignores the policy behind the MHPA. Also, the dissenting opinion ignores the language of the MHPA which extends limited immunity to doctors and hospitals who provide "treatment" to mentally ill patients and "treatment" within the plain language of the MHPA is given a broad meaning to include medical care for

Applying this interpretation to the present case, the patient was admitted to Montgomery Hospital in 1982 pursuant to an agreement with Norristown State Hospital. At that time, the patient was mentally ill and was in acute need of medical care. The care provided by appellants was medical care designed to "facilitate the recovery of a person from mental illness" under 50 P.S. § 7104. Because appellants provided such treatment, the trial court correctly instructed the jury that appellants were entitled to invoke the immunity provision of Section 114 of the MHPA unless their actions in treating the patient constituted gross negligence.[7]

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physical ailments as well as mental health care.

[7] Appellees, in their appellate brief, argue that the broad interpretation of the immunity provision of Section 114 of the MHPA which we take today would unconstitutionally deny equal protection to the mentally ill by denying them redress in the courts. It is presumed that the General Assembly does not intend to violate the United States or Pennsylvania Constitutions and any doubts are to be resolved in favor of finding the statute constitutional. 1 Pa. C.S. § 1922(3); Jenkins v. Hospital of the Medical College of Pennsylvania, 535 Pa. 252, 262, 634 A.2d 1099, 1104 (1993). Equal protection does not prohibit a state from classifying persons differently and treating the classes differently. James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 477 A.2d 1306 (1984).

Appellees' brief fails to demonstrate how Section 114 of the MHPA is unconstitutional. The mentally ill require more specialized or intensive care than the non-mentally ill. In order to protect the mentally ill and provide them with adequate treatment in the least restrictive manner, the General Assembly enacted the MHPA. Absent willful misconduct or gross negligence, the General Assembly provided immunity to health care providers of the mentally ill in order to ensure that this important government interest is met. Thus, the limited restriction on the right to sue in the MHPA bears a reasonable relation to a substantial government interest.

Accordingly, the order of the Superior Court is reversed and the order of the trial court entering judgment for appellants on the verdict of the jury is reinstated.

Mr. Justice Nigro files a dissenting opinion.

Judgment entered
Dated: June 17, 1997.

s/Charles W. Johns
Charles W. Johns, Esquire
Prothonotary

[J-202-96]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ANNE L. ALLEN A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ANNE M. ALLEN IN THEIR OWN RIGHT	:	Nos. 36 & 37 Eastern District Appeal Docket 1996
	:	Appeal from the Order of the Superior Court dated December 19, 1995 at No. 3129 Phila. 94, reversing the Order of the Court of Common Pleas of Montgomery County, Civil Division at 83-16964
Appellees	:	
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	ARGUED: October 17, 1996
Appellants	:	

DISSENTING OPINION

MR. JUSTICE NIGRO DECIDED: June 17, 1997

I disagree with the Majority's determination that the immunity provisions of the Mental Health and Procedures Act ("the Act"), 50 P.S. §7101, et seq., applies to the hospital and doctor in this case. I believe the Act applies only to treatment which is specifically directed toward aiding a patient's mental illness and not to treatment of physical ailments. As I would affirm the Superior Court's decision to award a new trial, I dissent.

The appellate courts have not applied the Act's limited immunity to a health care provider other than a psychiatrist. As the Act itself states, its purpose is to provide treatment for the mentally

ill, either voluntarily or involuntarily, in the least restrictive environment. See 50 P.S. §7102. Further, the Act has not been held to apply to any health care provider treating a mentally ill patient for a physical illness.

In Farago v. Sacred Heart General Hospital, 522 Pa. 410, 562 A.2d 300 (1989), a patient with a history of mental illness was admitted to the psychiatric unit of a hospital for treatment of a chronic schizophrenic condition. After evaluation and consultation with a psychiatrist, the patient was placed on an open ward as it was determined that she did not need special observation. The patient maintained she was raped by another patient in the bathroom adjoining the ward and filed suit against the hospital, alleging negligent supervision and protection. This Court stated that "(o)ne of the purposes of [the Act] is to provide limited protection from civil and criminal liability to mental health personnel and their employees in rendering treatment in this unscientific and inexact field." Id. at 417, 562 A.2d at 304. Finding the Act's immunity provisions applicable, we stated that the decision by the hospital to allow the patient to remain on an open psychiatric ward was a mental health treatment decision consistent with Act's mandate to impose the least restrictive alternatives to provide the patient with adequate treatment. Id. at 418, 562 A.2d at 304.

Similarly, in Werner v. Dept. of Public Welfare, 109 Pa.Commw. 134, 530 A.2d 1004 (1987), a psychiatric patient at a state hospital committed self-mutilation by removing his eye with a blunt stick just hours after he was released from leather restraints. Suit was filed alleging negligent treatment and supervision. At trial the judge instructed the jury that with respect to the decision to remove the restraint, the hospital could be found liable if it was grossly negligent. However, the judge instructed the jury to apply a negligence standard to all other allegations of inadequate treatment. The Commonwealth Court affirmed that decision, concluding that the decision to reduce the restraints was expressly enumerated in the Act. Id.

Conversely, in McNamara v Schleifer Ambulance Service, 383 Pa.Super. 100, 556 A.2d 448 (1989), the Superior Court found the immunity provision of the Act did not apply to insulate an ambulance company's conduct while transporting a mentally ill patient to the hospital The patient's seatbelt was unfastened by an ambulance attendant who wanted to reposition himself near another patient. After the seatbelt was unfastened, the mentally ill patient opened the rear doors of the ambulance and jumped out. In reversing the trial court's decision to apply the Act's immunity, the Superior Court reasoned the decision to release the patient was not a decision within the realm of treatment, care, diagnosis or rehabilitation as contemplated by the legislature. Id. at 103, 556 A.2d at 449.

Based upon the foregoing, our appellate courts have consistently interpreted the Act's immunity provision to apply only where a physician trained in the mental health field treats a patient's mental illness. In both Farago and Werner, a psychiatrist made treatment decisions concerning the removal of restraints or supervision of a mentally ill patient. Moreover, those patients were admitted to the psychiatric wards of the hospitals in order to receive treatment for their mental illness.

Instantly, the Superior Court reached the correct decision since Appellants never established that the patient was being treated for her mental illness or that her treatment differed from a non-mentally ill patient with similar physical ailments. When she was admitted to Montgomery Hospital, the patient was being treated by an internist for dehydration and internal medical problems in order to facilitate recovery of other physical ailments. She was admitted to the orthopedic floor of Montgomery Hospital, not the psychiatric wing, and no evidence of any consultation with a psychiatrist is found in the record. Further, as the Superior Court recognized, there is nothing in the record to indicate that the posey device "was used to treat anything other than a physical condition." Allen v. Montgomery Hospital at 167, 668 A.2d at 570. The Superior Court also properly points to Dr. Casey's testimony that in his experience,

patients were never transferred to Montgomery Hospital from Norristown State Hospital for treatment of their mental illness. Id.

The Mental Health and Procedures Act applies to protect only those physicians who are actively involved in the treatment of a patient's mental health. Since none of the treatment administered to the patient for her physical illnesses implicated the Act, I am in agreement with the Superior Court's conclusion that the Act's immunity provisions [sic] does not apply. I would affirm the Superior Court's decision to award a new trial.

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	**IN THE SUPERIOR COURT OF PENNSYLVANIA**
Appellants	:	
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	No. 3129 Philadelphia, 1994

Appeal from the Order entered August 18, 1994, Court of Common Pleas, Montgomery County, Civil Division at No. 83-16964.

BEFORE: McEWEN, JOHNSON and BROSKY, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of MONTGOMERY County be, and the same is hereby REVERSED AND REMANDED FOR A NEW TRIAL. JURISDICTION RELINQUISHED.

BY THE COURT:
s/David A. Szewczak
PROTHONOTARY

Dated: DECEMBER 19,1995

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	**IN THE SUPERIOR COURT OF PENNSYLVANIA**
Appellants	:	
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	No. 3129 Philadelphia, 1994

Appeal from the Order entered August 18, 1994, Court of Common Pleas, Montgomery County, Civil Division at No. 83-16964.

BEFORE: McEWEN, JOHNSON and BROSKY, JJ.

OPINION BY JOHNSON, J.:

In this appeal, we are asked to determine whether the immunity provision of the Mental Health Procedures Act applies to a health care provider who is not trained in the field of mental health, and who treats a patient's physical ailments, not a mental illness. Because we find that the immunity provision does not apply to such a situation, we reverse and remand this matter for a new trial.

Nancy Allen, an incompetent, by her parents, Walter E. and Anne M. Allen, and the Allens in their own right appeal from the order that denied their motion for a new trial and entered judgment in favor of Montgomery Hospital and Paul R. Casey, Jr., M.D.

Nancy, who has been diagnosed as mentally retarded with psychosis, was admitted to Norristown State Hospital in August 1980, after she had an adverse reaction to her medication and her parents had difficulty controlling her behavior. Nancy remained in Norristown State Hospital until November 1982, when she suffered physical ailments, including fever, dehydration, and a possible urinary tract infection. As a result, on November 30, 1982, Nancy was transferred to Montgomery Hospital for treatment of those physical ailments pursuant to an agreement between the hospitals. Upon her arrival at Montgomery Hospital, Nancy was examined in the emergency room by Dr. Casey, an internist. Dr. Casey found that Nancy was dehydrated and had a fever of unknown origin. In addition, Nancy showed signs of agitation. Dr. Casey directed that Nancy be admitted to Montgomery Hospital and ordered tests to rule out drug toxicity or a urinary tract infection. Nancy was then assigned to a private room on the orthopedic floor of the hospital.

Nancy received intravenous fluids, and was given medication to quiet her agitation as needed. As a result of her agitation and because she had trouble walking, a nurse placed Nancy in a Posey vest restraint. A Posey restraint covers the patient's chest, but allows his or her arms to remain free. Straps on the back of the restraint are tied to the bed to keep the patient from getting out of bed. Although Dr. Casey did not order the restraint, he knew about its use and did not order its removal. Except when she was given back care, or when her bedding or clothing was being changed, Nancy remained in the restraint at all times. Nancy's condition steadily improved, and she was scheduled for discharge on December 6, 1982.

However, on December 5, 1982, at approximately 2:00 a.m., a nurse found Nancy suspended about 6 inches above the floor between the siderails and her bed. She had managed to remove one arm from the Posey restraint, which had become entangled around her neck and was choking her. By the time she was discovered, Nancy had lost consciousness. The nurse, assisted by other nursing staff, was able to free Nancy from the restraint and begin CPR.

Nancy was resuscitated, but she suffered hypoxic encephalopathy resulting in permanent brain damage.

Thereafter, Nancy's parents were appointed as her guardians. They filed a malpractice claim against Montgomery Hospital and Dr. Casey, seeking to recover for Nancy's injuries as well as their own derivative claims. Norristown State Hospital and several other companies that supplied the Posey restraint were joined as additional defendants; however, the suppliers of the restraint were granted summary judgment.

Prior to trial, Montgomery Hospital and Dr. Casey filed a joint motion in limine, in which they requested a ruling as to whether the provisions of the Mental Health Procedures Act (MHPA), 50 P.S. § 7101, et seq., were controlling in this case. Specifically, they requested that they be afforded limited immunity pursuant to 50 P.S. § 7114. The effect of such immunity would be to immunize them from liability absent willful misconduct or gross negligence. Following a hearing, the trial court granted the motion and, pursuant to Pa.R.A.P. 1311, certified its interlocutory order for appeal to this Court. However, by order dated October 17, 1991, this Court declined to hear the appeal. The Allens then filed a petition for allowance of appeal to our supreme court, which was denied.

Subsequently, the case was bifurcated, and a jury trial commenced on the liability phase. After the Allens rested, a nonsuit was granted in favor of Norristown State Hospital. At the close of all of the evidence, the trial court instructed the jury regarding the standard it was to apply to determine liability. Because there were no allegations of willful misconduct, the court instructed the jury that it could not find Dr. Casey or Montgomery Hospital liable for Nancy's injuries unless it determined that their conduct constituted gross negligence. The jury returned a verdict finding that neither Montgomery Hospital nor Dr. Casey had been grossly negligent in treating Nancy. Thereafter, the Allens filed post-trial motions requesting a new trial. By order dated August 18, 1994, the court

denied their motions and directed that judgment be entered in favor of Dr. Casey and Montgomery Hospital. This appeal followed.

On appeal, the Allens raise the following contentions, which we have renumbered for purposes of review. The Allens assert that the trial court erred in determining that the immunity provisions of the MHPA applied to Dr. Casey and Montgomery Hospital because (1) they were treating Nancy's physical ailments, not a mental illness; (2) they failed to comply with the treatment provisions of the MHPA; and (3) the MHPA applies only to treatment decisions, not to the manner in which the care was administered. Finally, the Allens argue that (4) if Dr. Casey and Montgomery Hospital are entitled to immunity under the MHPA, then the immunity provision of the MHPA is unconstitutional. For all of these reasons, the Allens contend that the trial court erred in refusing to grant them a new trial.

Initially, we note that "[i]n reviewing the denial of a motion for a new trial, this [C]ourt must determine whether the trial court committed an abuse of discretion or error of law which controlled the outcome of the case." Trude v. Martin, 442 Pa.Super. 614, ___, 660 A.2d 626, 633 (1995). Further, "[w]henever a court attempts to ascertain the meaning of certain language within a statute, its goal is to effectuate the intent of the Legislature." Frontini v. Com. Dept. of Transp., 527 Pa. 448, 451, 593 A.2d 410, 411-12 (1991); see also 1 Pa.C.S. § 1921.

First, the Allens contend that because Dr. Casey and Montgomery Hospital were treating Nancy's physical ailments, the trial court erred when it determined that the immunity provisions of the MHPA were applicable to the facts of this case. The General Assembly enacted the MHPA in 1976 to provide rights and procedures for the treatment of the mentally ill in this Commonwealth. 50 P.S. § 7103. In pertinent part, the policy underlying this act is set forth in 50 P.S. § 7102 as follows:

> It is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of

> adequate treatment to persons who are mentally ill, and it is the purpose of this act to establish procedures whereby this policy can be effected. The provisions of this act shall be interpreted in conformity with the principles of due process to make voluntary and involuntary treatment available where the need is great and its absence could result in serious harm to the mentally ill person or to others. Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed. Persons who are mentally retarded, senile, alcoholic, or drug dependent shall receive mental health treatment only if they are also diagnosed as mentally ill, but these conditions of themselves shall not be deemed to constitute mental illness[.]

Consistent with this policy, the MHPA affords certain health care providers limited immunity from civil and criminal liability for specific decisions regarding treatment of a mentally ill patient. "This immunity is available to a mental health provider absent willful misconduct or gross negligence." Farago v. Sacred Heart Gen. Hosp., 522 Pa. 410, 414, 562 A.2d 300, 302 (1989)(emphasis added). The relevant language of the immunity provision provides:

> (a) In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency

> examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences. [Emphasis added].

50 P.S. § 7114(a). Further, our supreme court has held that the language "any other authorized person" encompasses hospitals. Farago, supra, at 419, 562 A.2d at 303.

The Allens assert that this provision does not apply in Nancy's case because she was not being treated under the MHPA while at Montgomery Hospital. As stated previously, the Allens contend that the act is inapplicable because Nancy was not being treated for mental illness; rather, she was being treated for her physical ailments. Section 7104, Provision for treatment, provides:

> Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness. It shall be provided to all persons in treatment who are subject to this act. It may include inpatient treatment, partial hospitalization, or outpatient treatment. Adequate inpatient treatment shall include such accommodations, diet, heat, light, sanitary facilities, clothing, recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions.
>
> Treatment shall include diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery.

50 P.S. § 7104(emphasis added). Further, the MHPA requires that a treatment team formulate and review an individualized treatment

plan for every person who is treated under the act. 50 P.S. § 7106. An individualized treatment plan is "a plan of treatment formulated for a particular person in a program appropriate to his specific needs." 50 P.S. § 7107. To the extent possible, such plans must be made "with the cooperation, understanding and consent of the person in treatment, and shall impose the least restrictive alternative consistent with affording the person adequate treatment for his condition." Id.

Our research has failed to disclose any case in which the MHPA was held to grant limited immunity to a health care provider other than a psychiatrist. Nor has the immunity provision been held to apply to any health care provider, including a psychiatrist, who was treating a mentally ill patient for a physical illness. Rather, the cases in which the limited immunity provision has been applied involve psychiatrists who made decisions regarding the level of supervision or restraint necessary to treat their patients' mental illnesses.

For example, in Farago, supra, Jessie Farago, who had a history of mental illness, was voluntarily admitted to the psychiatric unit of a hospital for treatment of her chronic schizophrenic condition. Following an evaluation by the admitting nurse and a telephone consultation with the psychiatrist, it was determined that Farago did not require any special observation. As a result, she was placed on an open co-ed ward. Farago maintained that she was raped by another patient in the bathroom adjoining the ward. Subsequently, Farago and her husband filed suit against the hospital, alleging that the hospital was negligent in its supervision and protection of Farago while she was in the psychiatric unit. The trial court determined that the MHPA immunity provision was applicable, and the jury returned a verdict in favor of the hospital. On appeal to our supreme court, the Faragos contended that the immunity provision was inapplicable to the facts of their case and the jury should have been instructed to apply an ordinary negligence standard. Specifically, the Faragos asserted that the immunity provision was applicable only to certain acts enumerated in the section, namely decisions to admit or

discharge patients or reduce patients' restraints. The court disagreed, stating that "[o]ne of the purposes of the [MHPA] is to provide limited protection from civil and criminal liability to mental health personnel and their employers in rendering treatment in this unscientific and inexact field." Id. at 417, 562 A.2d at 304. Thus, the court concluded that the decision by the hospital staff to allow Farago to remain in the open ward rather than on closer supervision was a treatment decision consistent with the MHPA mandate to impose the least restrictive alternatives consistent with providing the patient with adequate treatment. Id. at 418, 562 A.2d at 304.

Similarly, in Werner v. Dept. of Public Welfare, 109 Pa.Cmwlth. 134, 530 A.2d 1004 (1987), Charles Werner, a psychiatric patient at a state hospital, committed selfmutilation by removing his eye with a blunt stick several hours after he was released from prescribed leather restraints. Werner and his mother filed suit, alleging that the hospital was negligent in its treatment and supervision of Werner. The trial court instructed the jury that, with respect to the decision to release the restraints, the hospital could be found liable only if it is was grossly negligent. However, as to all other allegations of inadequate treatment, the trial judge instructed the jury to apply a simple negligence standard. The Commonwealth Court affirmed, reasoning that the decision to reduce a patient's restraints is expressly enumerated in the MHPA immunity provision. Id.

In contrast, this Court has held that the immunity provision did not apply to the conduct of an ambulance attendant while transporting a mentally ill patient to the hospital. McNamara v. Schleifer Ambulance Serv., 383 Pa.Super. 100, 556 A.2d 448 (1989). In that case, the patient was seated in a rear seat of the ambulance with his seat belt fastened. However, the attendant unfastened the patient's seatbelt to reposition himself near a second patient who was experiencing some distress. After his seatbelt was unfastened, the mentally ill patient opened the rear doors of the ambulance and jumped out. The trial court granted summary judgment in favor of the ambulance service on the basis of the immunity provision of the

MHPA. On appeal, this Court reversed, finding that the ambulance service was not entitled to immunity under the MHPA. In doing so, we reasoned that the decision to release the patient from his seatbelt was not a decision that took place within the context of treatment, care, diagnosis, or rehabilitation as contemplated by the legislature. Id. at 103, 556 A.2d at 449. Further, we stated that under the MHPA, the individuals who would make decisions that qualify for immunity under the act would be trained in the field of mental health. Id.

Based upon the reasoning set forth in these cases, it is clear that the appellate courts of this Commonwealth have interpreted the immunity provision of the MHPA to apply only where a physician trained in the mental health field treats a patient's mental illness. Accordingly, both Farago and Werner are distinguishable from the present case. In those cases, psychiatrists made treatment decisions concerning the removal of restraints or supervision of a mentally ill patient. Further, the patients were admitted to the psychiatric wards of the hospitals in order to treat those mental illnesses.

Here, however, Nancy was treated by Dr. Casey, an internist, for fever and dehydration, internal medical problems. N.T., October 8, 12, Volume II, at 505-506. She was placed in a restraint due to her intermittent agitation and difficulty walking. Id. at 621. Absolutely no evidence was presented that her agitation resulted from, or was in any way related to, her mental retardation or psychosis. Dr. Casey testified that Posey restraints were commonly used on patients who were not mentally ill. Id. at 620. Thus, there is no indication that the Posey device was used to treat anything other than a physical condition.

Further, during her stay at Montgomery Hospital, Nancy was never seen by a psychiatrist, nor did Dr. Casey consult with Nancy's psychiatrist from Norristown State Hospital. Id. at 569. Nancy was admitted to the orthopedic floor of the hospital where other medical and surgical patients were assigned, not to the psychiatric floor. Id. at 408. Dr. Casey also testified that in his experience, patients were never transferred to Montgomery Hospital from Norristown State

Hospital for treatment of their mental illnesses. Id. at 655-56. As a result, we find that the immunity provision of the MHPA is inapplicable to the facts of this case. Therefore, we are constrained to conclude that the trial court erred in determining that the MHPA's immunity provision was applicable to this case. Accordingly, the trial court erred when it instructed the jury that it could not find Dr. Casey or Montgomery Hospital liable absent gross negligence. Because this error may have controlled the outcome of this case, we must reverse the trial court order that denied the Allens' motion for a new trial and directed that judgment be entered in favor of Dr. Casey and Montgomery Hospital. Accordingly. we reverse and remand this matter for a new trial.

Because of our resolution of the Allens' first issue, we do not address their remaining contentions.

Order Reversed. Case Remanded. Jurisdiction Relinquished.

Brosky, J. files a Dissenting Opinion.

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	**IN THE SUPERIOR COURT OF PENNSYLVANIA** Philadelphia Office
Appellants	:	
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	No. 3129 Philadelphia, 199

Appeal from the Order entered August 18, 1994, Court of Common Pleas, Montgomery County, Civil Division at No. 83-16964.

BEFORE: McEWEN, JOHNSON and BROSKY, JJ.

DISSENTING OPINION BY BROSKY, J.

I believe that the trial court correctly interpreted and applied the immunity provision of the Mental Health Procedures Act ("MHPA"), 50 P.S. §7114 (a). Since the majority has held otherwise I am unable to join in its disposition and respectfully dissent therefrom. However, I write separately to articulate my rationale for affirming the order.

All of appellants' allegations of error implicate the trial court's construction and application of the MHPA. I will therefore begin with a review of the pertinent statutory provisions a

well as the fundamental rules of statutory construction before deciding whether the trial court abused its discretion or committed an error of law. Appellees, as providers of health care to a mentally ill individual, have invoked the limited immunity granted under section 7114(a) of the MHPA, 50 P.S., which is set forth as follows:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.

50 P.S. §7114(a).[1]

In construing this statute, the primary objective is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. §1921 (a). If possible, the statute must be construed to give effect to all of its provisions. Id. Where the words of a statute are clear and free from all ambiguity, the courts are not free to

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[1] Appellants did not assert that appellees had engaged in any willful misconduct; rather, they alleged that had been negligent. The willful misconduct element thus will not be further addressed. Except for the clause granting immunity to a physician or any other authorized person who participates in a decision that a person be treated or examined, the situation presented here does not appear to fall within any of the other enumerated categories for which immunity may be granted. I will accordingly confine my analysis to this part of the statute.

disregard the letter of it under the pretext of pursuing its spirit. Id., §1921 (b).

When the words of the statute are not explicit, however, the intention of the General Assembly may be ascertained by considering, among other matters:

> (1) The occasion and necessity for the statute; (2) The circumstances under which it was enacted; (3) The mischief to be remedied; (4) The object to be attained; (5) The former law, if any, including other statutes upon the same or similar subjects; (6) The consequences of a particular interpretation; (7) The contemporaneous legislative history; and (8) Legislative and administrative interpretations of such statute.

Id., §1921(c). In ascertaining the legislature's intent, the courts are to presume that the General Assembly: (1) did not intend a result that is absurd, impossible of execution or unreasonable; (2) intends the entire statute to be effective and certain; (3) did not intend to violate the Constitution of the United States or of this Commonwealth; and (4) intends to favor the public interest as against any private interest. 1 Pa.C.S.A. §1922 (1)-(5). The courts are also required to construe statutes or parts of statutes which are in pari materia together, if possible. 1 Pa.C.S.A. §1932 (b).

In general, the provisions of a statute must be liberally interpreted to effect its object and to promote justice. See 1 Pa.C.S.A. §1928 (c) (providing that statutes which do not fall within the classes enumerated in subsection (b), none of which are applicable here, shall be liberally construed). However, this court has recognized that particular provisions of the MHPA must be strictly construed. For example, in the case of In re: S.C., 280 Pa. Super. 539, 421 A.2d 853 (1980), we examined the standards by which a person may be involuntarily committed for an extended period of time pursuant to 50 P.S. §7303 (b). The Superior Court reasoned that

this provision should be strictly construed because an involuntary civil commitment implicates an individual's fundamental liberty interest, which he or she should not be deprived of without due process of law. Id., 280 Pa. Super. at 547, 421 A.2d at 857. Similar reasoning was utilized in Commonwealth v. Blaker, 293 Pa. Super. 391, 394, 446 A.2d 976, 978 (1981), where we relied on S.C. in support of our decision to strictly construe section 7301 of the MHPA, which governs involuntary emergency examination and treatment. Our subsequent decisions later extended the strict construction approach to other provisions of the MHPA even though the statute in question did not fall within the categories enumerated in section 1928(b) of the Statutory Construction Act, 1 Pa.C.S.A., and no fundamental liberty interest was at issue therein. See, e.g., Commonwealth v. Fewell, 439 Pa. Super. 541, 561-562, 654 A.2d 1109, 1119 (1995); In the Interest of Roy, 423 Pa. Super. 183, 186, 620 A.2d 1172, 1173 (1993), allocatur denied, 536 Pa. 644, 639 A.2d 30 (1994) and Commonwealth v. Moyer, 407 Pa. Super. 336, 339-340, 595 A.2d 1177, 1179 (1991), allocatur denied, 529 Pa. 656, 604 A.2d 248 (1992) (all of which strictly construed section 7111, which relates to the confidentiality of a patient's treatment records).

The instant case does not involve a deprivation of liberty as in In re: S.C. and Blaker. Nor does it involve the protection of a privacy right of the type at issue in Fewell, Roy and Moyer. Section 7114(a) of the MHPA also does not fall within the categories which must be strictly construed under 1 Pa.C.S.A. §1928 (b). I further note that while the issue was not directly addressed therein, our Supreme Court has employed a liberal rather than strict construction of section 7114. See Farago v. Sacred Heart General Hospital, 522 Pa. 410, 416-419, 562 A.2d 300, 303-304 (1989) (in construing statutory reference to any other authorized "person," the Supreme Court utilized the definitions found in the Statutory Construction Act and concluded that the term encompassed organizational entities, including corporations, partnerships and associations as well as natural persons; the Court also rejected the plaintiffs' narrow interpretation of the type of conduct for which immunity could be granted). Under these circumstances, In re: S.C.

and its progeny should not control the scope of construction of section 7114. Instead, I will follow the approach taken by the Supreme Court in Farago and employ a liberal construction. With these principles firmly in mind, I will now turn to the merits of appellants' claims.

Appellants first contend that the immunity provided in section 7114 should be construed to only apply to the persons specified therein who provide mental health care to patients. Appellants thus assert that appellees are not entitled to avail themselves of the immunity defense since they provided medical care to Nancy and treated her physical rather than mental disease. Appellants' argument that appellees were not treating Nancy's mental health is somewhat disingenuous.

Mental health and physical health cannot be viewed as wholly distinct entities and cannot be divorced from each other. Mental illness may be a manifestation of a physiological problem resulting from chemical imbalances within the body, trauma or the result of another disease process. This is especially true in Nancy's case, as her mental illness stems from her previous illnesses and idiosyncratic reactions to her medication. It was also the administration of medication and her failure to respond appropriately thereto which contributed to the deterioration of her physical health. More importantly, Nancy's medical records indicate that Norristown administered various drugs to her in an attempt to calm her highly agitated state. Appellees provided Nancy with similar drug therapy in addition to treating her other health-related ailments. It is thus inaccurate to suggest that appellees only treated Nancy's physical rather than mental condition. Because of the inter-relation between mental and physical health, emphasis should not be placed on the type of treatment rendered by a particular organization or physician. Rather, the focus should be on whether the treatment administered to a mentally ill person falls within the scope of conduct for which immunity is granted.

As indicated above, the MHPA grants limited immunity from civil and criminal liability for a treatment decision or any of its consequences to "a physician...or any other authorized person who participates in a decision that a person be...treated under this act."[2] 50 P.S. §7114(a), supra. While this provision does not specifically define the term "treated," definitions of adequate treatment and treatment are found elsewhere in the MHPA and appear as follows:

> Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness. It shall be provided to all persons in treatment who are subject to this act. It may include inpatient treatment, partial hospitalization or outpatient treatment. Adequate treatment shall include such accommodations, diet, health, light, sanitary facilities, clothing, recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions. Treatment shall include diagnosis, evaluation, therapy or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote recovery.

50 P.S. §7104 (emphasis added). In construing the statute, I am also cognizant of the legislature's intent, which has been articulated as follows:

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[2] Our Supreme Court has construed the term "any other authorized person" to include an organizational entity such as a hospital. Farago v. Sacred Heart General Hospital, 522 Pa. at 417-419, 562 A.2d at 303-304. Consequently, Montgomery falls within the ambit of the statute.

> It is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, and it is the purpose of this act to establish procedures whereby this policy can be effected. The provisions of this act shall be interpreted in conformity with the principles of due process to make voluntary and involuntary treatment available where the need is great and its absence could result in serious harm to the mentally ill or to others. Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed.

50 P.S. §7102.

Review of the above provisions makes it clear that the legislature intended to make the least restrictive and adequate treatment available to those who are mentally ill. 50 P.S. §7102, supra. See also 50 P.S. §7107 (requiring a treatment plan formulated for a particular patient to be the least restrictive alternative consistent with affording the person adequate treatment for his or her condition). In defining the extent of the treatment covered by the act, the legislature could have specifically limited it to the care and services directly relating to a patient's mental illness. The legislature did not do so and instead broadly defined treatment to include medical care as well as any other care and services which will alleviate a patient's pain and distress and promote his or her recovery from mental illness. 50 P.S. §7104, supra.

Appellants nonetheless suggest that the same standard of negligence should be applied regardless of the mental status of their patient, since the health care provider renders the same services to both types of patients. While appellants' reasoning is facially appealing, it contravenes the legislature 's clear intent and ignores the fact that mentally ill patients may require more

specialized or intensive care for their medical needs precisely because of their mental illness. If appellants' interpretation is adopted, some medical care providers would be unwilling to render care and services to mentally ill patients because of the increased risk of injury and costs associated therewith, including the potential for litigation.[3] Even if treatment were to be offered, health care practitioners would attempt to minimize their risks by placing the mentally ill patients in a more restrictive environment or adopting other precautions which would lead to the imposition of greater cost on the patient thereby making such care less affordable and available. Such a result would violate the legislature's expressed purpose of making adequate-treatment, including medical care, available to the mentally ill.

It is obvious that Nancy was a mentally ill patient who received treatment from Norristown in accordance with the provisions of the MHPA. In treating Nancy's mental condition, Norristown was required to maintain decent, safe and healthful living conditions for Nancy, including the provision of medical care. 50 P.S. §7114, supra. Because Norristown was not equipped to handle all of its patients' medical needs, it entered into an agreement with Montgomery Hospital and Dr. Casey, pursuant to which they would provide the requisite medical care to Norristown's patients. Appellees thus assumed Norristown's duties and responsibilities while the patients were transferred into their custody and care. Had Norristown been equipped to treat Nancy's physical maladies, it would unquestionably have been entitled to avail itself of the limited immunity provided by the MHPA. Moreover, appellees were providing treatment for Nancy's mental condition to the extent that attempts were made to calm her agitation. Under these circumstances, I am not persuaded that immunity should be denied

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[3] This attitude may be even more prevalent today in light of the tremendous changes occurring in the health care arena. Health care providers are shifting towards a managed care approach, the effect of which has been to force institutions to emphasize cost control and expenditure reduction.

merely because a different health care provider assumed Norristown's duties for a limited period of time.

In light of the legislature's explicit intent, the rules of statutory construction and the above reasoning, I interpret section 7114's usage of the term "treated" to have the same meaning as set forth by the legislature in section 7104 of the MHPA. Construction of the statute in this manner ensures that the least restrictive treatment will be made available to the mentally ill in exchange for which those who render such care will receive immunity from civil and criminal liability, absent willful misconduct or gross negligence. Because the trial court properly construed the MHPA as conferring immunity on appellees for their provision of care to Nancy, appellants are not entitled to relief on this basis.

Appellants next argue that the limited grant of immunity does not apply to the manner in which the health care was administered. Appellants instead believe that the immunity only covers a health care practitioner's decision to administer a specific plan of treatment to a patient. Under appellants' approach, immunity would only exist for the decision to render treatment to a patient; it would not apply to the actual implementation of the treatment plan itself. Such a result would be unreasonable, would thwart the legislature's intent, and would render the limited grant of immunity wholly nugatory.

The legislature specifically granted immunity for a treatment decision or for any of its consequences. See 50 P.S. §7114 (a), supra. This language evinces the legislature's recognition that a plan of treatment would be actually administered to the mentally ill patient and not merely formulated for theoretical purposes. If the immunity statute is be [sic] construed in the manner posited by appellant, it would have been unnecessary for the legislature to grant health care providers immunity because, without actual implementation, the mere creation of the plan would have absolutely no effect and would not give rise to any litigation. Rather, it is the actual administration of the treatment plan which could have

possible untoward consequences for the patient and others with whom he or she has contact.

When viewed within this context, it is obvious that the immunity provision serves to protect health care providers for their actual administration of the treatment plan in the event it does not work as anticipated. Appellants' interpretation, however, would render the immunity virtually meaningless since it would only apply to the formulation of the treatment plan which, standing alone, has no effect on the patient. Appellants' approach would further permit suit to be brought for the administration of treatment, and thus, would result in either less available or more restrictive care to the patient, as previously discussed. I therefore reject appellants' proposed interpretation and would hold that the statutory immunity granted to a health care provider's decision to treat a mentally ill patient necessarily includes the manner or actual administration of the treatment.

My conclusion is supported by the Supreme Court's decision in Farago v. Sacred Heart General Hospital, supra. In Farago, the plaintiff was admitted to the psychiatric unit of the hospital. Id., 522 Pa. at 412, 562 A.2d at 301. Hospital staff decided that Mrs. Farago's schizophrenic condition did not require special observation and permitted her to stay on an open co-ed ward with hourly physical checks. Id. Several hours later, Mrs. Farago was discovered in a bathroom in the company of a male patient. Id., 522 Pa. at 413, 562 A.2d at 301. Although she did not apprise hospital personnel of this information at the time, she told another staff member three days later that she had been raped by the male patient. Id. Mrs. Farago subsequently sued the hospital for their alleged negligence in failing to adequately supervise and protect her. Id., 522 Pa. at 413, 562 A.2d at 302.

On appeal, the Supreme Court rejected the plaintiff's narrow and restrictive interpretation of section 7114 and determined that the hospital was entitled to invoke the limited immunity provided by the MHPA. Id., 522 Pa. at 417-419, 562 A.2d at 303-

304. In reaching this result, the Supreme Court cited the definitions of treatment and adequate treatment provided in section 7104 and found that the hospital's placement of Mrs. Farago on an open co-ed ward with hourly physical checks constituted a treatment decision which was protected under section 7114, absent gross negligence or willful misconduct. Id., 522 Pa. at 417-418, 562 A.2d at 304. The Supreme Court's decision thus suggests that it did not accept the plaintiffs' attempt to avoid application of the statutory immunity by distinguishing between the defendant's formulation and execution of the treatment plan. See id.

Notwithstanding their assessment to the contrary, appellants are essentially challenging appellees' decision to utilize restraints and their failure to more thoroughly supervise Nancy. The decision to use a moderate restraint to prevent Nancy from injuring herself and others and the institution of regular checks is virtually indistinguishable from the type of treatment decision which was rendered in Farago. Consequently, appellees' treatment of Nancy falls within the scope of conduct for which immunity is granted. Since the trial court correctly interpreted and applied the statute, no relief is due on this claim.

Appellants' third issue involves the question of whether the trial court erred in applying the gross negligence standard to appellees' alleged violations of other provisions of the MHPA and the regulations promulgated thereunder. In their brief, appellants catalogue the statutory and regulatory violations allegedly committed by appellees. See Appellants' Brief at 42-44. These violations either implicate appellees' failure to prepare a proper treatment plan and consult with mental health professionals in accordance with 50 P.S. §7106 and §7107, or involve appellees' decision to use a restraint.

Appellants' arguments ignore the fundamental purpose for which the pertinent statutes and the regulations arising thereunder were created. Treatment plans must be implemented for individuals who are initiating mental health treatment; these plans

must necessarily be revised on a continuing basis. However, there is no requirement that a plan be prepared for a patient who is already receiving treatment and is merely transferred to another facility on a temporary basis.

In this case, Nancy became a patient at Norristown in 1980 and remained there until she was sent to appellees in 1982 for treatment of her specific physical problems. It was thus Norristown's responsibility to formulate the long-range psychiatric treatment plans for Nancy, including consultation with appropriate mental health professionals. Upon transferring Nancy, Norristown provided appellees with the information pertinent to her condition so that they could render appropriate care. In light of Nancy's particular physical symptoms, treatment for an extended period of time was not contemplated by appellees. Rather, appellees intended to return Nancy to Norristown's custody as soon as her physical symptoms improved.

Under these circumstances, there was simply no need for appellees to prepare the thorough type of treatment plan envisioned by the MHPA. Nor was it necessary for appellees to consult with other mental health professionals because it was Nancy's physical rather than mental illness which was in immediate need of treatment. Moreover, appellees were aware of Nancy's psychiatric condition and believed that they were able to adequately manage it with appropriate pharmacological therapy.

In any event, it is apparent that appellees did devise a treatment plan which included the administration of intravenous fluids, antibiotics, pain medication and sedatives, as well as the usage of a moderate physical restraint for Nancy's safety. This was the least restrictive plan of treatment which was specifically formulated for Nancy's individual needs, and therefore, constituted a treatment decision for which limited immunity is granted absent willful misconduct or gross negligence. See Farago v. Sacred Heart General Hospital, supra. The trial court thus did not err in refusing to apply an ordinary negligence standard with regard to appellees'

alleged violations of the MHPA and the regulations promulgated thereunder.

Having disposed of the above questions and determined that none warrants the grant of any relief, appellants' challenge to the constitutionality of section 7114 must be addressed.[4] In considering this matter, it must be presumed that the General Assembly did not intend to violate either the United States or Pennsylvania Constitutions in enacting the statute. 1 Pa.C.S.A. §1922 (3). Moreover,

> [t]he strong presumption of constitutionality enjoyed by acts of the General Assembly and the heavy burden of persuasion on the party challenging an act have been so often stated as to now be

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[4] A party challenging the constitutionality of a statute is required to notify the Attorney General, by registered mail, where the Commonwealth is not a party. Pa R.C.P., Rule 235, 42 Pa.C.S.A; Pa.R.A.P., Rule 521(a), 42 Pa.C.S.A. Where notice has not been given, the appellate courts will not consider the constitutional claim. See, e.g., Kengle v. Fairman Drilling Co., 532 Pa. 304, 313, 615 A.2d 1298, 1303 (1992) (defendant waived constitutional argument by failing to notify the Attorney General pursuant to Pa.R.C.P. 235 and Pa.R.A.P. 521); Hill v. DiVecchio, 425 Pa. Super. 355, 367, 625 A.2d 642, 648 (1993); allocatur denied, 538 Pa. 614, 645 A.2d 1316 (1994) (an appellate court will not consider a challenge to the constitutionality of a statute where no notice has been given to the Attorney General; if the litigant raising the constitutionality of the statute fails to notify the Attorney General pursuant to Pa.R.C.P. 235 and Pa.R.A.P. 521, the claim is barred). As applied here, I note that the Commonwealth was a party to this action, although the matters regarding its potential liability were removed from the case with the other litigants' consent. I also observe that the constitutional claim was not raised until appellants filed their post-trial motions. The certified record discloses that copies of appellants' original and supplemental post-trial motions were served, albeit by regular mail, on Theodore Chylack, Esq., the Senior Deputy Attorney General representing the Commonwealth. It does not appear from the certified record that either Mr. Chylack or another member of the Attorney General's office elected to respond to this issue. Under these circumstances, appellants have sufficiently preserved their challenge to the constitutionality of the statute.

> axiomatic. Legislation will not be invalidated unless it clearly, palpably and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.

Jenkins v. Hospital of the Medical College of Pennsylvania, 535 Pa. 252, 262, 634 A.2d 1099, 1104 (1993) (citations and quotation marks omitted). Appellants' constitutional arguments will be examined in accordance with these principles. Appellants challenge the statute on equal protection grounds. It is appellants' position that the statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it permits the mentally ill to be treated differently from those who are not mentally afflicted by impinging upon their ability to institute suit against their health care providers.

> [P]rinciples of equal protection do not absolutely prohibit a state from classifying persons differently and treating the classes in different ways. Equal protection requires that uniform treatment be given [to] similarly situated parties. If distinctions are drawn, then the challenged policy must be reasonably justified. The level of justification required will depend upon the type of classification drawn and the governmental interest in promulgating the classification, and the relationship between that interest and the classification itself.... The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an important though not fundamental right; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an

> "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

Dansby v. Thomas Jefferson Hospital, 424 Pa. Super. 549, 557, 623 A.2d 816, 820 (1993), allocatur denied, 539 Pa. 650, 651 A.2d 538 (1994) (citations omitted).

Matters such as race, alienage, national origin, gender and illegitimacy are classifications which traditionally have been subject to strict or heightened review. See, e.g., City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440-441, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313, 320-321 (1985). However, age, mental illness or mental retardation are not considered suspect or quasi-suspect classifications and have been accorded the least searching level of judicial scrutiny. See id., 473 U.S. at 441-446, 105 S.Ct. at 3255-3257, 87 L.Ed. at 321-324. Although appellants challenge the statute based on its disparate treatment of the mentally ill, their argument also asserts that the statute impinges upon their right to seek redress in the courts. An entitlement to monetary damages has not been deemed a fundamental right. Dansby v. Thomas Jefferson Hospital, 424 Pa. Super. at 557-558, 623 A.2d at 821. The appellate courts nonetheless have held that the right to access the courts is an important interest which is subject to an intermediate standard of review. Id., (citing James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 146-147, 477 A.2d 1302, 1306 (1984)). I will therefore apply a heightened standard of scrutiny to the extent that appellants' challenge implicates an important right.

Appellants contend that a mentally ill patient who receives health care is similarly situated to a non-mentally ill patient. However, this reasoning ignores the fact that the mentally ill are different, by virtue of their illness, from those who are not so afflicted. As previously noted, mentally ill patients may require more specialized or intensive health care than the non-mentally ill. Mental

illness can also affect a person's ability to communicate and cooperate with his or her health care providers, thus rendering the administration of treatment more difficult. Consequently, mentally ill patients cannot be deemed similarly situated to those patients who do not suffer from a mental disorder.

More importantly, the instant statute does not impose a limitation only upon the rights of the mentally ill to institute suit. The MHPA grants health care providers immunity from civil and criminal liability for their treatment decisions and the consequences resulting therefrom regardless of whether it is the patient or another non-mentally ill third-party who is affected. See 50 P.S. §7114(a), supra. See Werner v. Commonwealth, Department of Public Welfare, 109 Pa. Commw. 134, 137-138, 530 A.2d 1004, 1007 (1987) (construing section 7114 of the MHPA and rejecting assertion that section 7114 only precludes a third-party from commencing suit; in reaching this conclusion, the court stated that the legislature intended no distinctions between situations where a treatment decision results in harm to the patient or a third-party). The statute thus has the same impact upon the rights of the mentally ill as it does on the non-mentally ill. When viewed in this manner, it is clear that the statute does not treat the mentally ill any differently from the non-mentally ill with regard to their right to institute suit.

Assuming, arguendo, that appellants have made out a cognizable equal protection issue, the statute nonetheless withstands constitutional scrutiny. As previously observed, the mentally ill are different from those who are not mentally ill. The legislature was aware of these distinctions and the manner in which they may impact upon the ability of the mentally ill to obtain less restrictive and adequate treatment. Consequently, the legislature enacted the MHPA to protect the mentally ill and ensure that they receive adequate treatment in the least restrictive environment possible consistent with their particular treatment needs.

Protection of the mentally ill and provision for their adequate treatment are important and legitimate state interests. To

encourage and facilitate this goal, the legislature decided to ameliorate certain risks by granting limited immunity from suit to those who have undertaken the burden of treating the mentally ill. The limited restriction on the right to institute suit bears a substantial relation to the goals sought to be achieved by the legislature and the important governmental interest involved. I accordingly deem the statute constitutional.

Based on the above analysis, I conclude that the trial has correctly interpreted and applied section 7114(a) by according appellees the limited immunity granted thereunder. I would therefore affirm the order.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL DIVISION

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	No. 83-16964
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	

OPINION

NICHOLAS, P.J. NOVEMBER 9, 1994

This opinion is necessitated by plaintiffs' appeal to the Superior Court of Pennsylvania from our Order dated August 18, 1994, denying plaintiffs' Motion and Supplemental Motion for Post-Trial Relief and entering judgment in favor of defendants, Montgomery Hospital and Paul R. Casey, Jr., M.D.

Plaintiffs are Anne L. Allen, a/k/a Nancy Allen (Nancy), and her parents and guardians, Walter E. Allen and Anne M. Allen. Plaintiffs commenced this action by writ of summons, filing their complaint against defendants on November 20, 1984. In their complaint, plaintiffs alleged that defendants were responsible for negligent treatment of Nancy which resulted in Nancy sustaining severe personal injuries, including hypoxic-encephalopathy causing

permanent brain damage. Plaintiffs' complaint further alleged that defendants' negligence aggravated Nancy's pre-existing mental retardation and psychosis.

On December 4, 1990, defendants filed a Motion in Limine, requesting -- upon the court's consideration of a set of facts stipulated to by all parties -- a ruling as to whether the provisions of the Mental Health Procedures Act (MHPA), 50 P.S. § 7101, et seq, governed this case. By Opinion and Order dated June 11, 1991, the Honorable Stanley R. Ott of this court granted defendants' Motion and ruled that "the standard of negligence set forth in §7114 of the Mental Health Procedures Act shall be applied as the law of the case."

§7114 provides, in pertinent part, that:

> (a) In the absence of willful misconduct or gross negligence...a physician... or any other authorized person who participates in a decision that a person be examined or treated under this act... shall not be civilly or criminally liable for such decision or for any of its consequences.

The primary effect of Judge Ott's ruling was that, in order to prevail on the issue of liability, plaintiffs would be required to establish at trial by a preponderance of the evidence that defendants committed gross negligence in their treatment of Nancy.[1]

Pursuant to Pa.R.A.P. 702 (b), Judge Ott certified his decision for an interlocutory appeal to the Superior Court (See Judge Ott's Order dated July 9, 1991). The Superior Court, by per curiam Order dated October 17, 1991, declined to hear defendants' appeal. Defendants subsequently filed a Petition for Allowance of Appeal to

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[1] There was no evidence presented of any willful misconduct in the instant case.

the Supreme Court of Pennsylvania, which was denied per curiam by Order dated April 22, 1992.

The case came on for trial before the undersigned and a Jury, beginning October 4, 1993, with testimony commencing on October 6, 1993. The Jury returned its verdict on October 21, 1993, finding that the conduct of neither defendant was grossly negligent. Under 50 P.S. §7114, defendants thus could have no liability to plaintiffs for Nancy's injuries.

Plaintiffs filed their Motion for Post-Trial Relief on October 29, 1993, supplementing their Motion on November 1, 1993. Oral Argument on plaintiffs' Motion was heard before the undersigned on August 17, 1994. Following argument, and after consideration of the briefs of counsel, this court, by Order dated August 18, 1994, denied plaintiff's Motion and Supplemental Motion for Post-Trial Relief and entered judgment in favor of defendants and against plaintiffs, upon the verdict of the Jury.

Plaintiffs filed their notice of appeal to the Superior Court of Pennsylvania on August 29, 1994. By Order dated August 31, 1994, this court directed plaintiffs to file and serve upon the undersigned trial Judge a concise statement of matters complained of on appeal, pursuant to Pa. R.A.P. 1925(b). Plaintiffs filed their concise statement on September 14, 1994.

In paragraphs one (1) and two (2) of their concise statement, plaintiffs contend that the court erred in applying the immunity provisions of 50 P.S. §7114 to defendants in the instant case. We disagree. At trial, the undersigned specifically adopted Judge Ott's ruling in this regard as the law of the case (N.T., October 6, 1993, pp. 33-34). On post-verdict review, we see no reason to amend our position, and we believe that Judge Ott's opinion dated June 11, 1991 fully addresses the issues raised by plaintiffs in paragraphs one (1) and two (2) of their concise statement .

In paragraphs three (3) and four (4) of their concise statement, plaintiffs contend that the application of 50 P.S. §7114 to this case violates the equal protection clauses of the United States and Pennsylvania constitutions. Plaintiffs contend that §7114, as applied, is unconstitutional because it creates "different rights of a mentally ill patient from the rights of the non-mentally ill patients in the same facility and under the care of the same doctor or hospital" and because it deprives "a person of rights, privileges and remedies based solely upon the patient being mentally ill." We believe plaintiffs' contentions in this regard to be without merit.

We note first that it is settled law that a strong presumption of constitutionality attaches to any lawfully enacted legislation, and all doubts relating to a statute's constitutionality must be resolved in that statute's favor, *Dansby v. Thomas Jefferson U. Hosp.*, 424 Pa. Super. 549, 623 A.2d 816 (1993). The party challenging a statute's constitutionality must rebut this presumption "by a clear, palpable, and plain demonstration that the statute violates a constitutional provision," *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302, 1304 (1984). In the instant case, plaintiffs cited this court no authority, nor has our research uncovered any, indicating that the application of §7114 to this case is in any manner unconstitutional.

Plaintiffs' complaint is that, under §7114, plaintiffs were required to demonstrate gross negligence on the part of defendants in order to establish defendants' liability. Nancy's specific injuries resulted while she was restrained by a "posey device". Because such devices also can be used for patients who are not mentally ill, plaintiffs contend that it is a violation of equal protection for Nancy to be required to prove gross negligence whereas a patient injured in a posey device who was not mentally ill would need prove only ordinary negligence in order to recover. We disagree.

The right to equal protection of the law does not deny the legislature the power to treat different classes of persons in different ways. Rather it requires that distinctions between classifications of persons be justifiable according to the appropriate degree of

constitutional scrutiny, *Commonwealth v. Bell*, 512 Pa. 334, 516 A.2d 1172 (1986), *In re Estate of Long*, 410 Pa. Super. 607. 600 A.2d 619 (1992), *Estate of Cox*, 327 Pa. Super. 479, 476 A.2d 367 (1984).

Where a statutory scheme creates a "suspect" classification (e.g., one based upon race or religion), or when the legislation restricts the exercise of a fundamental right (e.g., a right for which the constitution makes explicit provision), the court is called upon to review the legislation under the "strict scrutiny" standard of constitutional analysis. See, e.g., *Pa Liquor Control Bd. v. SPA Athletic Club,* 506 Pa. 364, 485 A.2d 732 (1984), *James v. SEPTA, supra, Pennsylvania Bar Ass'n v. Com.*, 147 Pa. Cmwlth. 351, 607 A.2d 850 (1992). Where a statutory scheme affects rights traditionally deemed "important," though not "fundamental," (e.g., liberty interests), courts review under the "intermediate" standard of constitutional analysis. Finally, where the legislation creates neither a suspect classification nor restricts the exercise of any "fundamental" or "important" right, the legislation is reviewed under the "rational basis" standard of constitutional analysis. Under this standard, where a legitimate purpose behind a statute has been identified, and where any conceivable rational relationship exists between that purpose and the means chosen to foster it, the statute must be upheld. *Tony Savatt, Inc. v. Latrobe Brewing Co.*, 400 Pa. Super. 296, 583 A.2d 796, appeal denied, 527 Pa. 668, 593 A.2d 843, cert. den., 112 S.Ct. 586, 116 L.Ed. 2d 611 (1992), *Dansby v. Thomas Jefferson U. Hosp., supra.*

In the instant case, plaintiffs contend that the strict scrutiny standard of review must be applied. Plaintiffs point to Art. 1, §11 of the Pennsylvania Constitution:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the

> Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

We do not agree that the application of §7114 to the instant case effects any violation of Article 1, §11 of our constitution. 50 P.S. §7114 does not close the court doors to Nancy. Rather, it sets the evidentiary burden Nancy must meet in order to recover. Although our research uncovered no appellate cases analyzing the constitutionality of §7114 in light of Article 1, §11, we note *Kline v. Arden H. Verner Co.*, 503 Pa. 251, 469 A.2d 158 (1983), wherein our Supreme Court held that the exclusivity provision of the Workers' Compensation Act does not violate Article 1, §11 even where it works to bar an injured employee from suing to recover for an impairment not covered by workers' compensation. See, also, *Tsarnas v. Jones & Laughlin Steel Corp.*, 488 Pa. 513, 412 A.2d 1094 (1980), *Shaffer v. Procter & Gamble*, 412 Pa. Super. 630, 604 A.2d 289 (1992), appeal denied, 532 Pa. 665, 616 A.2d 986 (1993). We note, further, *Lewis v. School Dist. of Philadelphia*, 517 Pa. 461, 538 A.2d 862 (1988), where the court applied the rational basis test in holding constitutional the denial to an employee (pursuant to the Workers' Compensation Act) of a right of action against his employer for uninsured motorist benefits, even where a non-employee who was injured in the same accident would retain a right of action.

In the instant case, 50 P.S. §7114 clearly was enacted with the intention of furthering a legitimate governmental objective. Citing 50 P.S. § 7102, the court held in *In re McMullins*, 315 Pa. Super. 531, 462 A.2d 718 (1983), that the purpose of the MHPA is to assure the availability of adequate treatment to persons who are mentally ill and to make treatment available where the need is great and its absence could result in serious harm to the mentally ill person or to others. 50 P.S. §7102 further provides, in pertinent part, that:

> "Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least

> restrictions consistent with adequate treatment shall be employed."

It appears to this court beyond cavil that the limited immunity accorded by §7114 bears a reasonable relationship to the purpose articulated in §7102.

§7114 was enacted in order to encourage adequate treatment of the mentally ill in the least restrictive environment possible, by granting those involved with the decision-making process in regard to such treatment a limited immunity from criminal and civil liability. See, also, *Farago v. Sacred Heart General Hospital*, 522 Pa. 410, 562 A.2d 300 (1989).

Given the often unpredictable behavior and the frequent and often extreme difficulties involved in the treatment of the mentally ill, we believe it is eminently logical for the legislature to conclude that subjecting providers of care to the mentally ill to liability for ordinary negligence in their treatment decisions would discourage treatment of the mentally ill and would encourage such treatment as was offered to be given in a highly restrictive, constrained environment. Conversely, it appears fully logical that according providers a limited immunity from liability would encourage such providers to offer and provide care under less restrictive conditions. We believe the purposes behind the MHPA to be not only legitimate, but important, even compelling. We believe that §7114 effects a reasonable, appropriately restricted means of advancing the legislature's purposes. Again, an analogy to the Workers' Compensation Act appears appropriate:

> "The Workmen's Compensation Law has deprived some of rights in exchange for surer benefits, immunized some, to make possible resources to benefit many, who were heretofore without possible or practical remedies," *Kline, supra*, 469 A.2d 158 at 160.

Similarly, in the instant case, the mentally ill are precluded from recovery for ordinary negligence but, in return, benefit from a statutory scheme making more likely their receiving adequate treatment in as non-restrictive an environment as possible.

We thus believe that 50 P.S. §7114, as applied in the instant case, passes constitutional muster.

Finally, in paragraph five (5) of their concise statement, plaintiffs contend that the court erred in holding "that a violation of a provision of the Mental Health Procedures Act, and of the regulations adopted under such Act, was not a sufficient basis for liability, but would be a sufficient basis for liability only if the jury went further and found such violation constituted gross negligence." We disagree and, again, we believe Judge Ott's opinion dated June 11, 1991 fully meets plaintiffs' contentions in this regard. We further note *Werner v. Dept. of Public Welfare*, 109 Pa. Cmwlth 134, 530 A.2d 1004 (1987), where the court held that §7114's immunity provisions take precidence over more general provisions of the MHPA concerning a patient's entitlement to rights under the laws of this Commonwealth.

For all of the foregoing reasons, our Order dated August 18, 1994 should be affirmed.

BY THE COURT:
s/William T. Nicholas, P.J.
WILLIAM T. NICHOLAS, P. J.

Notice of the above Order mailed to the following on November 9, 1994:
John V. Hasson, Esquire
John R. Warner, Esquire
William H. Pugh, Esquire
Theodore J. Chylack, Esquire

s/Phyllis M. Griffen
Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL DIVISION

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	No. 83-16964
v.	:	
MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.	:	

ORDER SUR PLAINTIFFS' MOTION AND SUPPLEMENTAL MOTION FOR POST-TRIAL RELIEF

AND NOW, this 18th day of August, 1994, upon consideration of the briefs of counsel and after oral argument before the undersigned on August 17, 1994, the plaintiffs' Motion and Supplemental Motion for Post-Trial Relief are hereby DENIED.

Judgment is entered in favor defendants, Montgomery Hospital and Paul R. Casey, Jr., M.D. and against plaintiffs, Anne L. Allen, a/k/a Nancy Allen, an incompetent, by Walter E. Allen and Anne M. Allen, her guardians and Walter E. Allen and Anne M. Allen, in their own right, upon the jury's verdict.

BY THE COURT:

/s William T. Nicholas, P.J.
WILLIAM T. NICHOLAS, P.J.

Notice of the above Order mailed to the following on August 18, 1994:
John V. Hasson, Esquire plaintiffs
John R. Warner, Esquire for Montgomery Hospital
William H. Pugh, IV, Esquire for Paul R. Casey, Jr., M.D.
Court Administrator's Office

s/Diana Davis
Secretary

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ANNE M. ALLEN, IN THEIR OWN RIGHT,	:	No. 83-16964
v.	:	
MONTGOMERY HOSPITAL, PAUL R. CASEY, M.D. and NORRISTOWN STATE HOSPITAL	:	

OPINION AND ORDER

OTT, J., June 11, 1991

Procedural History

This case was called for trial on December 6, 1990. At that time all counsel agreed that a ruling on the joint Motion in Limine of defendants Montgomery Hospital and Paul R. Casey, Jr., M.D., that the Mental Health Procedures Act[1] be applied as the law of the case was critical to the proceedings. We therefore granted all counsel additional time to prepare memorandums of law and requested that they attempt to prepare a joint stipulation of facts to

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[1] Act of July 9, 1976, P.L. 817, No. 143, §101, 50 P.S. §7101 et seq.

be used in the determination of the applicability of the limited immunity provision of the Mental Health Procedures Act. A stipulation as to relevant facts was filed and oral argument was held on March 26, 1991. Because we are of the opinion that the attached Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the matter, this Court has agreed to certify the issue to Commonwealth Court pursuant to 42 Pa.C.S.A. §702(b).

Facts

Nancy Allen (hereinafter "Nancy") was admitted to Norristown State Hospital (hereinafter "Norristown") on August 11, 1980. Prior to her admission she had been treated by psychiatrists at various institutions for mental retardation and psychosis. While Nancy was a patient at Norristown, her mental deficiencies were treated with various psychotropic medications. Improvement in her mental status was sought by enrolling Nancy in a special progress school at Norristown. During the month of November, 1982, while at Norristown, Nancy became very agitated and exhibited behavior such as crying, rolling on the floor, hitting other patients and screaming. Her condition was treated with various medications including Vistaril, by placing her in a "side" or "security" room, and by placing her in various restraints, including a "posey" restraint. Toward the end of November, 1982 Nancy experienced health problems including fever, dehydration and possible urinary tract infection. On the morning of November 30, 1982, Nancy was transferred from Norristown to the emergency room of Montgomery Hospital for treatment of these physical ailments.

Upon her transfer to Montgomery Hospital her mental status was reported by her treating psychiatrist, Onward Szeto, M.D., as being

> severely mentally retarded with very little cognitive function. Her speech is incoherently (sic) and she is not orientated (sic) in time, place and person. She could not be engaged in any meaningful communications. The diagnosis is mental retardation, profound with psychosis.

At the time of her transfer, Nancy was accompanied by Norristown Information Sheets which indicated her condition as being "dehydrated, cannot swallow, muscular rigidity, rule out toxicity". When admitted to the emergency room Nancy was seen by Dr. Casey, an internist. Dr. Casey was her attending physician while she was a patient at Montgomery Hospital.

The Nursing Admission Assessment dated November 30, 1982 at 3:00 p.m. contained the following observation: "Awake, not apparently oriented times three; non-communicative; patient can become combative at times; posey needed at all times".

Dr. Casey admitted Nancy to Room 449 on the orthopedic floor where she was the only mental patient. Various medications were ordered for Nancy including Vistaril, a psychotropic drug prescribed for agitation.

During the 3:00 to 11:00 p.m. nursing shift on November 30, 1982 a vest type posey restraint was placed on Nancy for her safety. The restraint was put around the chest area with two straps on each side which were tied to the rails of Nancy's bed. The restraint remained on Nancy with the exception of when she received back care and when her clothes and bed were changed. Although there was no physician's order authorizing the initial or continued use of the restraint, Dr. Casey and his partner Dr. Belasco intended Nancy to remain in it throughout her hospitalization.

At approximately 2:00 a.m. on December 5, 1982, Nurse Patricia Seneko found Nancy half-on and half-off her bed at

its foot with the arm of the restraint entangling her head and binding her neck. The straps of the restraint were still tied to the bedrails and Nancy was suspended by the posey restraint wrapped around her neck. Nancy's left arm was still in the armhole of the restraint although she had worked her right arm free. Nurse Seneko ran down the hall and secured help from the nurses' station. Nurse Hunsberger untied the restraint, CPR was initiated and an emergency code was signalled. The effect of the entanglement of the posey restraint was strangulation and loss of oxygen. Consequently, Nancy sustained hypoxic encephalopathy resulting in permanent brain damage.

Nancy's progress at Montgomery Hospital was monitored by the Nursing Department at Norristown from December 2, 1982 to March 4, 1983 by way of telephone calls and three visits. On December 6, 1982 Onward Szeto, M.D. and Donald M. Twaddell, M.D., Norristown's Medical Director, visited Nancy at Montgomery Hospital.

On March 4, 1983, Nancy's treatment for dehydration having been completed, she returned to Norristown where she remained as a mental patient except for several interim hospitalizations at another hospital. In October, 1990 she was transferred to a private institution.

Suit was filed on Nancy's behalf alleging medical negligence on the part of Montgomery Hospital and Dr. Casey concerning their failure to exercise due care in the manner in which Nancy was treated. Montgomery Hospital joined Norristown State Hospital as an additional defendant.

Issue

Does Section 7114 of the Mental Health Procedures Act apply to this case?

Discussion

In 1976 the Legislature passed the Mental Health Procedures Act to assure adequate treatment for mentally ill persons and to establish procedures to effect this policy. The goal of the Act is to make voluntary and involuntary treatment available where the need is great and its absence could result in serious harm to the mentally ill person or to others. 50 P.S. §7102.

The Act establishes the rights and procedures for all mentally ill persons who are treated at a facility. 50 P.S. §7102. "Facility" is defined as any mental health establishment including a hospital which "provides for the diagnosis, treatment, care or rehabilitation of mentally ill persons, whether as outpatients or inpatients. Id.

The Act further defines adequate treatment as

> ...a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness....Adequate inpatient treatment shall include such accommodations, diet, heat, light, sanitary facilities, clothing, recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions....Treatment shall include diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery. 50 P.S. §7104.

Pursuant to 50 P.S. §7106 a treatment team is required to formulate and review an individualized treatment plan for all persons who are treated under the Act. An individualized treatment plan is defined as a plan "formulated for a particular person in a program appropriate to his specific needs". Such a plan

must impose "the least restrictive alternative" available consistent with providing adequate treatment. 50 P.S. §7107. The person under treatment is to be examined and his treatment plan is to be reviewed not less than once every thirty days. 50 P.S. §7108.

In order to promote treatment by the least restrictive means, limited immunity from civil and criminal liability is granted to health care providers who are involved in treatment decisions. 50 P.S. §7114 states in pertinent part

> (a) In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment shall not be civilly or criminally liable for such decision or for any of its consequences.

As the Supreme Court of Pennsylvania noted in Farago v. Sacred Heart Hospital, 522 Pa. 410, 562 A.2d 300 (1989), mental health personnel render treatment in an "unscientific and inexact field". Limited immunity allows them to provide the statutorily required least restrictive treatment without fear of liability to their patients and others.

Plaintiffs argue that Section 7114 does not apply in cases where lack of due care in providing medical treatment is at issue. They maintain that immunity is available only for certain enumerated treatment decisions: the decision to examine or treat a person; the decision to discharge; decisions to place a patient under

partial hospitalization, outpatient care or leave of absence and the decision to reduce the restraints upon a person. Since their suit is based on the negligent manner in which Nancy was treated rather than on any of the aforementioned decisions, they claim that the immunity provision is inapplicable. Defendants counter that a decision to treat a person involves much more than the initial decision to provide treatment. They maintain that absent willful misconduct or gross negligence, immunity is provided for the manner in which treatment is administered.

The Farago court held that the immunity provision of the Act applies to treatment decisions. There, Mrs. Farago was admitted to Sacred Heart Hospital due to a schizophrenic episode. After initial evaluation by the admitting nurse and a telephone consultation with the on-call psychiatrist, they determined that Mrs. Farago did not require special observation. Routine orders, including hourly physical checks, were prescribed. Mrs. Farago maintained that on the day of her admission to Sacred Heart's open ward she was raped in the bathroom by a male patient. The Faragos brought suit against the hospital for alleged negligence for failing adequately to supervise and protect Mrs. Farago. At the close of trial the court instructed the jury that a willful misconduct or gross negligence standard should be applied pursuant to the immunity provision of the MHPA. The jury's verdict in favor of Sacred Heart was affirmed by Superior Court and Supreme Court.

The Supreme Court focused its analysis on the fact that Mrs. Farago's admission under routine orders, including hourly checks, constituted a plan of treatment appropriate to her specific needs. Such a plan is mandated by 50 P.S. §7107 (Individualized Treatment Plan). The Court noted that under 50 P.S. §7114 immunity is granted to one "who participates in a decision that a person be examined or treated under this act". Because the staff's decision to allow Mrs. Farago to stay in the open ward was a treatment decision, the court determined that it was protected under the immunity provision.

We recognize that there are factual distinctions between Farago and the instant case. While at Sacred Heart Hospital Mrs. Farago was in the psychiatric unit and was treated solely for psychiatric problems. Decisions regarding her treatment were made by mental health professionals including a nurse and an on-call psychiatrist. Nancy Allen was at Montgomery Hospital primarily for treatment of a medical condition but also received treatment for mental illness. This treatment included administering of psychotropic drugs, frequent observation and the use of restraints. She was assigned a room on the orthopedic floor and was treated by staff members who were not specifically trained in psychiatry. We note the court found that Mrs. Farago's admission under routine orders, including hourly checks constituted an individualized treatment plan pursuant to 50 P.S. §7107. This plan was designed in accordance with the mandate for adequate treatment set forth in 50 P.S. §7104. Similarly we note that the course of treatment fashioned by the Montgomery Hospital Staff for Nancy constitutes adequate treatment which 50 P.S. §7104 defines, in part, as including "such...medical care as (is) necessary to maintain decent, safe and healthful living conditions".

The stated policy of the MHPA is "to seek to assure the availability of adequate treatment to persons who are mentally ill" 50 P.S. §7102. To promote this goal the legislature provided limited immunity to a "...person who participates in a decision that a person be examined or treated under this act..." 50 P. S . §7114. When the phrase "treated under this act" is read in conjunction with Sections 7104 and 7107 of the MHPA, it becomes clear that immunity is granted for more than just the initial decision to treat. Section 7104 provides that treatment includes

> ...diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery.

Section 7107 states that an individualized treatment plan is a "plan of treatment formulated for a particular person in a program appropriate to his needs". Given the broad definition of treatment and the policy of the Act to make such treatment available it is illogical to limit immunity merely to the decision to admit a person into treatment. It is the decision to provide a certain course of treatment rather than the mere decision to treat which is afforded immunity under Section 7114. We base this conclusion on the Farago court's determination that the decision by Sacred Heart Hospital to allow Mrs. Farago to remain on an open ward on one hour watch was a treatment decision which was protected by the immunity provision. Likewise, placing Nancy Allen in a private room and controlling her behavior with medication and restraints was a treatment decision. The health care professionals who made this decision are entitled to immunity from ordinary negligence.

In McNamara v. Schleifer Ambulance Service, 383 Pa.Super. 100, 556 A.2d 448 (1989), Superior Court determined that ambulance drivers who were transporting a mentally ill patient from one hospital to another were not entitled to immunity under the Act for their ordinary negligence. Based on the court's reading of Section 7102 (Statement of Policy) and Section 7103 (Scope of Act), it determined that "the legislature contemplated the decision-making process under §7114 as one which would take place within the context of treatment, care, diagnosis or rehabilitation". Id. at 103. 356 A.2d at 449. The court noted that the ambulance attendants had not received any medical training and was especially persuaded by the fact that the attendants were not participating in the patient's treatment. This is in contrast to the instant case where trained medical personnel devised and effectuated a plan of medical treatment for a mentally ill patient. While the McNamara court stated that the legislature contemplated that the individuals who would participate in a decision to treat would be trained in the field of mental health, this seems overly narrow considering the broad statutory definition of treatment. It was precisely due to Nancy's status as a mental patient that an individualized treatment plan consisting of psychotropic drugs, posey restraint and nursing checks

was initiated. We believe that granting immunity to the medical professionals who treated Nancy's illness is consistent with the intent of the MHPA.

One of the most important features of the MHPA is the provision that an individualized treatment plan "shall impose the least restrictive alternative consistent with affording the person adequate treatment for his condition". 50 P.S. §7107. The Act recognizes that while the state has a responsibility to protect the mentally ill, it must do so with a minimum deprivation of individual liberty. By extending immunity to authorized persons who make treatment decisions, the Act encourages them to allow patients the maximum amount of freedom. If treatment decisions were not covered by Section 7114, the "least restrictive alternative" provision would be hollow indeed. Surely health care providers would eschew the least restrictive alternative if they faced the possibility of legal action in the absence of willful misconduct or gross negligence. When read in conjunction, the least restrictive alternative provision and the immunity provision reflect a legislative choice to favor the mentally ill patient's liberty interest over his ability to recover for mere negligence. Limiting immunity to the decisions to admit, discharge or reduce the restraints on a patient is contrary to legislative intent. We note that the immunity provisions of the MHPA apply to individual health care providers as well as to hospitals where treatment is given. Farago at 416-417, 562 A.2d at 303.

As a mentally ill patient, Nancy Allen is a person the Act was intended to protect. Among the protections afforded her is the right to in-patient medical care and treatment including therapy needed to alleviate pain and distress. She is also entitled to care and other services that supplement treatment and aid or promote recovery, 50 P.S. §7104. Both the treatment Nancy received for dehydration and for mental illness qualify as treatment under 50 P.S. §7104. The staffs of Montgomery Hospital and Norristown State Hospital and Dr. Casey were authorized persons who participated in

a treatment decision. Therefore, they are entitled to immunity in the absence of willful misconduct or gross negligence.

ORDER

AND NOW, this 11th day of June, 1991, upon consideration of the joint Motion in Limine of defendants Montgomery Hospital and Paul R. Casey, Jr., M.D., the response filed thereto, the memoranda submitted by counsel and following oral argument, the joint Motion in Limine is granted and the standard of negligence set forth in §7114 of the Mental Health Procedures Act shall be applied as the law of the case.

Because this interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the matter, permission to pursue an interlocutory appeal to Commonwealth Court pursuant to 42 Pa.C.S.A. §702(b) is granted.

BY THE COURT:

s/Stanley R. Ott
J.

Copies of the foregoing Order
mailed June 11th, 1991, to:
John V. Hasson, Esquire
John R. Warner, Esquire
William H. Pugh, IV, Esquire
Daniel G. Ronca, Esquire

s/Shirley R. Clegg

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

ANNE L. ALLEN, A/K/A NANCY ALLEN, AN INCOMPETENT, BY WALTER E. ALLEN and ANNE M. ALLEN, HER GUARDIANS, and WALTER E. ALLEN and ALLEN [sic] M. ALLEN, IN THEIR OWN RIGHT,	:	No. 83-16964
v.	:	
MONTGOMERY HOSPITAL, PAUL R. CASEY, M.D. and NORRISTOWN STATE HOSPITAL	:	

ORDER

AND NOW, this 9th day of July, 1991, the Order entered on June 11, 1991, is hereby VACATED. Upon consideration of the joint Motion in Limine of defendants Montgomery Hospital and Paul R. Casey, Jr., M.D., the response filed thereto, the memoranda submitted by counsel and following oral argument, the joint Motion in Limine is granted and the standard of negligence set forth in §7114 of the Mental Health Procedures Act shall be applied as the law of the case.

Because this interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the matter, permission to pursue an interlocutory appeal to Superior Court pursuant to 42 Pa.C.S.A. § 702(b) is granted.

BY THE COURT:

s/Stanley R. Ott
J.

Notice of the above
mailed July 9th, 1991, to:
John V. Hasson, Esquire
John R. Warner, Esquire
William H. Pugh, IV, Esquire
Daniel G. Ronca, Esquire

s/Shirley R. Clegg

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOHN W. ALBRIGHT, AS EXECUTOR OF THE ESTATE OF ELIZABETH JEAN ALBRIGHT AND INDIVIDUALLY IN HIS OWN RIGHT,	:	No. 31 Eastern District Appeal Docket 1996
Appellant,	:	Appeal from the Order of the Superior Court entered November 22, 1995, at No. 648 Philadelphia 1995, Affirming the Order of the Court of Common Pleas of Montgomery County entered February 8, 1995, at Civil Division, No. 89-18657.
v.	:	
ABINGTON MEMORIAL HOSPITAL AND MONTGOMERY COUNTY EMERGENCY SERVICES,	:	ARGUED: October 17, 1996.
Appellees.	:	

OPINION

MR. JUSTICE CAPPY DECIDED:
June 17, 1997

This appeal raises two issues. First, whether a trial judge can enter summary judgment in favor of a mental health facility covered under the Mental Health Procedures Act (the Act)[1] where an allegation of gross negligence has been offered? Second, assuming an affirmative answer to the first issue, whether in this case gross negligence has been demonstrated by the pleadings, reports, depositions, and records so as to preclude the entry of summary judgment on behalf of Appellee Abington Memorial Hospital (Appellee or the Hospital) and against Appellant John W. Albright

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[1] 50 P.S. §7101, et seq.

(Appellant or Mr. Albright)? As a collateral matter, we must address the res nova issue for this court of what constitutes "gross negligence" for purposes of the Act. For the reasons which follow, we affirm the trial court's granting of summary judgment in favor of the Hospital.

In order to properly address the issues raised in this case, a detailed review of its facts and procedural history is necessary. In April, 1987, Elizabeth Jean Albright was involuntarily committed to Eugenia Hospital, and was subsequently discharged into an outpatient program after improvement of her condition. Again in August, 1988, Mrs. Albright was involuntarily committed to Thomas Jefferson Hospital. However, on September 6, 1988, it was determined that Mrs. Albright did not meet the standards for an involuntary commitment.

Shortly thereafter, Mrs. Albright was involuntarily committed to the Montgomery County Emergency Services (MCES) from September 12, 1988 through September 28, 1988 after showing psychotic symptoms, which included threats against and physical attacks upon her husband. After being treated with appropriate medication and therapy, Mrs. Albright's condition improved so that a regime of 90 days of involuntary outpatient care at the Hospital was ordered by the Montgomery County Court of Common Pleas. The court's order indicated that a failure to comply with the order would result in a return to inpatient status. The 90-day period began on September 28, and was to have elapsed on December 27, 1988. Mrs. Albright was evaluated by Dr. George Buck, the Hospital's psychiatrist on September 30, 1988. She was diagnosed as having a bipolar disorder, i.e., a manic depressive disorder.

The arrangements for the outpatient treatment included therapy sessions once a month for three months. While Mrs. Albright refused to sign the consent to treatment, she did attend the first therapy session with her husband on October 13, 1988 and the second session on November 3, 1988. At both of these sessions, Dr. Buck re-evaluated Mrs. Albright. During these sessions Mrs.

Albright indicated that she was not taking her medication, and that the medication was too expensive to take on a regular basis. Dr. Buck advised Mrs. Albright and her husband that she should take the medication as directed. Dr. Buck also suggested that Mrs. Albright see Audrey Moody, a social worker and clergywoman, in hope that Ms. Moody would provide supportive therapy and an insight as to the need for medication and compliance with the medical program.

Mrs. Albright failed to attend her third appointment scheduled for December 8, 1988 with Ms. Moody. Evidently, neither Dr. Buck, Mr. Albright, MCES nor the Hospital's case management office were informed that Mrs. Albright had missed her December 8 session.

On December 10, 1988, when the family visited Mrs. Albright's father, a renowned physician, her condition began to deteriorate. Mrs. Albright's father observed to Mr. Albright that Mrs. Albright was overly active and becoming manic. As the Christmas holiday approached, Mrs. Albright's condition continued in decline.

Although the dates are somewhat unclear, it appears that on December 21, 1988, the 84th day of the 90-day outpatient treatment program, Mr. Albright called the Hospital and informed Ms. Moody that Mrs. Albright was not taking her medication and was losing touch with reality. He was told that someone would return his call. Early the next morning, Mr. Albright called MCES, after failing to reach anyone at the Hospital. The person to whom he spoke promised to investigate. Mr. Albright testified that later that day, the Hospital's doctor with whom Mrs. Albright had the appointment on December 8th called and stated that because Mrs. Albright had missed her appointment, there was nothing that the Hospital could do. The doctor did advise that he call MCES. However, in Mr. Albright's follow-up telephone conversation with MCES, MCES explained that the Hospital would have to handle the problem. At that point, the individual that Mr. Albright spoke with originally at MCES called back and stated that the Hospital's case management

unit would handle the situation and that Mr. Albright was to contact Mr. Joseph Windish of the Hospital's case management office.

In a subsequent telephone conversation with Mr. Windish, Mr. Albright explained that Mrs. Albright was having a breakdown, was becoming manic, and was in need of medical help. However, Mr. Windish informed Mr. Albright that as the 90-day treatment period was almost at end, it would be highly irregular to have a patient committed that late in the treatment plan. Upon Mr. Windish's request, Mr. Albright described Mrs. Albright's behavior. He stated that his wife had let the dinner burn in the oven so that smoke was coming out of the oven when he arrived home from work. He explained that Mrs. Albright had been walking at night and was chain smoking. Finally, he described cigarette burns in six-month-old furniture, but was not sure when the burns were made.

Mr. Windish's notes indicate that he explained to Mr. Albright that as there were only four days left in Mrs. Albright's treatment period, that this was not enough time to attempt a §306 transfer,[2] and suggested that Mr. Albright attempt an involuntary commitment under §302.[3] Mr. Albright responded that he had filed numerous §302 petitions in the past but that his wife was still not getting the help that she needed. The conversation ended with Mr. Windish informing Mr. Albright that he would discuss the situation with his supervisor, Mr. Scott McCalla.

Mr. Albright called the Hospital later that day and again spoke with Mr. Windish. By that time Mr. Windish had spoken with his supervisor who indicated that nothing could be done as there was

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2 §306 of the Act relates to the transfer of persons in involuntary treatment to a facility imposing lesser or greater restraint on the patient. 50 P.S. §7306. This section requires a hearing before a judge or a mental health review officer if the transfer constitutes a greater restraint upon a person's liberty.

3 §302 of the Act refers to an involuntary emergency examination and treatment authorized by a physician. 50 P.S. §7302.

no time for a §306 transfer and that the case was probably not strong enough to qualify for a §302 commitment. Mr. Windish stated that he would call Mrs. Albright and schedule an appointment with her for December 28, the earliest available date. He also indicated that he would attempt to determine whether anyone had followed up on Mrs. Albright's missed appointment.

After speaking with Ms. Moody, who agreed to meet with Mrs. Albright on December 28, Mr. Windish telephoned Mrs. Albright to reschedule. However, Mrs. Albright became verbally aggressive, indicated that she wanted to focus on Christmas with her family and that she was through with appointments. Mrs. Albright did tell Mr. Windish to call back after Christmas and that she might reschedule at that time.

Upon his arrival that evening, Mr. Albright asked his wife if anyone had called from the Hospital, to which Mrs. Albright replied, "I told them I would meet them at the ocean." After an uneventful evening during which Mrs. Albright may have spoken with her father, Mrs. Albright's father called Mr. Albright at approximately 10:00 p.m. and told him to get his wife into a hospital. When the Albright's son returned home at approximately 10:30 p.m., he engaged in an argument with his mother. Thereafter, Mr. Albright and his son retired upstairs for the evening leaving Mrs. Albright downstairs in the den where she slept.

In the morning hours of December 23, 1988, a fire erupted in the Albright home which took Mrs. Albright's life. The fire was determined to have originated in the den. While the cause of the fire was never established with certainty, it was determined to have most probably been caused by careless smoking.

Mr. Albright thereafter brought the present wrongful death and survival action against, inter alia, the Hospital.[4] The Hospital raised the affirmative defense of qualified immunity found in §7114(a) of the Act in its answer and new matter. Pursuant to the qualified immunity provision of the Act, the Hospital is immune from civil and criminal liability for certain decisions that it makes unless it committed willful misconduct or gross negligence.

On October 11, 1994, the Hospital filed a motion for summary judgment. Following oral argument, the trial court granted the Hospital's motion on February 8, 1995. The trial court found that as a matter of law, the Hospital's conduct did not rise to the level of gross negligence. On November 22, 1995, a unanimous panel of the Superior Court affirmed, finding that based upon Appellant's deposition testimony as supplemented by Hospital medical records and notes of treating staff, Appellant failed to set forth a prima facie case of gross negligence.[5] Moreover, the Superior Court determined that the trial court did not err in taking the issue of the Hospital's negligence from the jury or in finding that no reasonable jury could have found that the Hospital acted in a grossly negligent manner.

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4 An action was also filed against MCES. However, MCES's motion for summary judgment was granted by the trial court, and Appellant's appeal of that determination was withdrawn.

5 The Superior Court, in affirming the trial court's determination, characterized the situation as one where the moving party was relying in whole or in part upon oral deposition testimony. Therefore, the Superior Court employed the three step analysis set forth in Dudley v. USX Corp., 414 Pa. Super. 160, 606 A.2d 916 (1992), alloc. denied, 532 Pa. 663, 616 A.2d 985 (1992) used to evaluate a motion for summary judgment in such situations. The first step of the analysis is to determine whether the plaintiff offered facts sufficient to establish a prima facie case. The second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, a determination is made as to whether in granting summary judgment, the trial court usurped the role of the jury by resolving any issues of material fact. In this case, the Superior Court found that Appellant failed the first step of the analysis in that he failed to establish a prima facie case.

With respect to the first issue on appeal, Appellant raises two subarguments. Appellant initially argues that, because both the Act and case law fail to provide a clear definition of what constitutes the difference between ordinary negligence and gross negligence, resolution of whether the Hospital's conduct constituted gross negligence should have been left for the jury; therefore, this is a question which is inappropriate for resolution by summary judgment. Appellant also argues that if he alleges gross negligence and can establish even ordinary negligence on the part of the Hospital, then it is for the jury to decide whether the Hospital's conduct constitutes gross negligence.

To resolve Appellant's first argument, we must interpret the Act's qualified immunity provision. This section of the Act provides certain individuals and entities with the protection of limited immunity from civil and criminal liability:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, or that the restraint upon such person be otherwise reduced, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences.
>
> 50 P.S. §7114(a).

Simply stated, Appellant must prove willful misconduct or gross negligence to throw off the blanket of limited immunity which protects a mental health facility such as the Hospital. As Appellant

does not assert willful misconduct on the part of the Hospital, our focus narrows to whether the Hospital's conduct rises to the level of gross negligence. Obviously, the meaning of this phrase is critical to the determination of the Hospital's immunity under the Act and the propriety of summary judgment in favor of the Hospital.

The Act itself does not provide a definition of the phrase "gross negligence." Moreover, this court has not had the opportunity to determine what constitutes gross negligence for purposes of the Act. Both the trial court and the Superior Court in the case sub judice relied upon the definition of gross negligence as stated by the Superior Court in Bloom v. DuBois Regional Medical Center, 409 Pa. Super. 83, 597 A.2d 671 (1991).

In Bloom, a husband and wife brought suit against the DuBois Regional Medical Center, the manager of the psychiatric unit, and a psychiatrist employed by the center for injuries sustained from an incident in which Mrs. Bloom, who was voluntarily admitted to the psychiatric unit of the center for inpatient treatment, was found after a failed suicide attempt. In reversing the granting of preliminary objections in favor of the psychiatrist, the Superior Court analyzed the limited immunity provision of the Act and in doing so, attempted to define the difference between ordinary negligence and gross negligence. After noting that the Act itself failed to provide a definition and determining that cases from this Commonwealth interpreting the Act failed to provide a workable definition to evaluate the complaint, the Bloom court turned to Keeton, Prosser and Keeton on Torts, Ch. 5, §34 at pp. 210-11 (5th ed. 1984) for an analysis of the common law. The court found that degrees of negligence have largely been rejected at common law as vague, impracticable, difficult, and confusing.

Finding Pennsylvania cases interpreting the phrase outside of the context of the Act to be of little value, but still being left with the legislation to be interpreted, the Bloom court arrived at a definition of gross negligence for purposes of the Act:

> It appears that the legislature intended to require that liability be premised on facts indicating more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. We hold that the legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.

Bloom, 409 Pa. Super. at ___, 597 A.2d at 679.

We believe that this definition is a clear, reasonable, and workable definition of gross negligence which is consistent with the purpose and intent of the Act. Therefore, Appellant's argument that the definition of gross negligence is unclear must fail.

Appellant's second argument regarding the first issue is that if any lesser degree of negligence can be shown by Appellant, then it is for the jury to decide the issue of whether the conduct of the Hospital rises to the level of gross negligence. Appellant quotes Bloom in support of his position. "[T]he determination of whether an act or failure to act constitutes negligence, of any degree, in view of all the evidence has always been particularly committed to determination by a jury. It is an issue that may be removed from consideration by a jury and decided as a matter of law only where the case is entirely free from doubt and there is no possibility that a reasonable jury could find negligence." Bloom, 409 Pa. Super. at ___, 597 A.2d at 679-80 (citations omitted). As the trial court found that the facts presented could amount to "ordinary negligence," Appellant asserts that pursuant to Bloom, the trial court erred in taking the issue of gross negligence from the jury.

While it is generally true that the issue of whether a given set of facts satisfies the definition of gross negligence is a question of fact to be determined by a jury, a court may take the issue from a

jury, and decide the issue as a matter of law, if the conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence. See, e.g., Willett v. Evergreen Homes, Inc., et. al., 407 Pa. Super. 141, 595 A.2d 164 (1991), alloc. denied, 529 Pa. 623, 600 A.2d 539 (1991)(summary judgment affirmed as to employees of facility pursuant to Mental Health and Retardation Act of 1966, 50 P.S. §4603, which contains a limited immunity provision similar to that found in the Act at issue and which immunizes certain treatment decisions unless such decisions rise to the level of, inter alia, gross negligence); 57A Am. Jur. 2d §256. Appellant's reliance upon and interpretation of Bloom is in error. The Bloom court merely restated basic summary judgment law. Never did the Bloom court indicate that where, as here, a plaintiff asserts gross negligence but establishes only ordinary negligence, summary judgment would be precluded. A more logical and sound reading of the proposition set forth in Bloom is that the determination of whether an act or failure to act constitutes gross negligence is for a jury, but may be removed from consideration by a jury and decided as a matter of law only where the case is entirely free from doubt and there is no possibility that a reasonable jury could find gross negligence.

To require mental health employees and their employers to defend jury trials on the issue of gross negligence where the trial judge finds as a matter of law that, at best, only ordinary negligence has been established, would gut the limited immunity provision of the Act of any meaning and unfairly subject such employees and facilities to protracted and expensive litigation. Therefore, Appellant's arguments regarding the first issue on appeal must fail.

We now turn to Appellant's second issue on appeal. Appellant contends that he has presented by the pleadings, reports, depositions, and records sufficient evidence of gross negligence so as to preclude the entry of summary judgment in favor of the Hospital.

In reviewing a grant of summary judgment, an appellate court may disturb the order of the trial court only where there has been an error of law or a clear or manifest abuse of discretion. Shomo v. Scribe, ___ Pa. ___, ___, ___ A.2d ___, ___ (1996); Panichelli v. Liberty Mutual Insurance Group, 543 Pa. 114, 116, 669 A.2d 930, 931 (1996). Nevertheless, the scope of review is plenary; the appellate court shall apply the same standard for summary judgment as the trial court. Copper v. Delaware Valley Medical Center, 539 Pa. 620, 632, 654 A.2d 547, 553 (1995).

Granting of summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b).[6] The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 144-45, 615 A.2d 303, 304 (1992).

Appellant argues that sufficient facts have been presented to show gross negligence on the part of the Hospital, and that therefore, the granting of summary judgment in favor of the Hospital was in error. Specifically, Appellant alleges that the Hospital failed to provide Mrs. Albright with proper treatment, ignored warnings of her deteriorating mental condition, and failed to have Mrs. Albright committed as an inpatient.

Appellant's primary contention is that the Hospital did nothing to follow-up on Mrs. Albright's failure to attend her December appointment. It is not disputed that Mrs. Albright's failure to attend her December appointment was not promptly addressed by

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6 Pa.R.C.P. 1035 has been rescinded effective July 1, 1996 and new Rules of Civil Procedure 1035.1 through 1035.5 governing summary judgment replace former Rule 1035. However, these changes do not affect our standard of review in this matter.

the Hospital. Yet, when the missed appointment was brought to its attention, the Hospital's staff sought through various conversations with both Mr. Albright and Mrs. Albright to reschedule the appointment, and attempted to arrange such a meeting within a week. It must be noted that the Hospital was never informed in any of these conversations that Mrs. Albright was violent or dangerous to herself or others, which may have pointed to a different course of action.[7]

Appellant also argues that the Hospital ignored Mrs. Albright's deteriorating mental condition and failed to commit Mrs. Albright. Appellant submits that after being informed of Mrs. Albright's manic state, the Hospital did nothing. Appellant's expert opined that the Hospital could have made an ex parte telephone call to the "signing magistrate" seeking to commit Mrs. Albright for failing to comply with the outpatient order and that its failure to do so represents a gross deviation from the standards of case management.

To resolve this issue, we must focus upon what the Hospital was informed in the days prior to the fire which took Mrs. Albright's life. Specifically, the Hospital, in an attempt to evaluate the possibility of commitment, asked Mr. Albright about Mrs. Albright's condition. Mr. Albright informed the Hospital of the following. Mrs. Albright had not been taking her medication. She had missed her last appointment. She had a breakdown, was becoming manic, and was walking around at night. She had left a dinner burn in the

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7 Additionally, Appellant contends that the Hospital did not provide an adequate, updated, and fully documented treatment plan as required by the Act, 50 P.S. §7104, 7108, and therefore, because the Hospital violated the Act's provisions, it cannot avail itself of the Act's limited immunity provision. Appellant raised these same arguments and allegations in his Petition For Allowance of Appeal with respect to an issue on which we denied allocatur. Appellant cannot now argue an issue for which allocatur was not granted, nor attempt to inject such an issue into the issues which were granted. Moreover, there is no indication that these arguments were made before the trial court or the Superior Court. Finally, Appellant's bald allegations concerning the Hospital's treatment plan are without any meaningful support from the record.

oven. Finally, she was chain smoking and there were some cigarette burns on the couch, but it was not clear when the burns were made.

It is with this information that the Hospital determined what appropriate and possible courses of action would be for Mrs. Albright. The Hospital believed that by Thursday, December 22, the 85th day of the 90-day outpatient treatment period, there was insufficient time to attempt a §306 commitment, which would involve committing Mrs. Albright as an involuntary inpatient. This type of commitment involves the transfer of a person subject to involuntary treatment to another facility. However, if such a transfer entailed a greater restraint upon a person's liberty, which would have been the case here in transferring Mrs. Albright to inpatient status, a court hearing and a finding of necessity was required. 50 P.S. §7306(c). Again, the Hospital believed that timing was such that a §306 petition could not have been decided prior to the expiration of Mrs. Albright's 90-day order.

Likewise, the Hospital believed a petition for an emergency §302 commitment of Mrs. Albright was insupportable. A §302 commitment would have required a finding that Mrs. Albright was severely mentally disabled and in need of immediate treatment. 50 P.S. §7302. A person is severely mentally disabled when, as a result of mental illness, her capacity to exercise self-control, judgment and discretion in the conduct of her affairs and social relations or to care for her own personal needs is so lessened that she poses a clear and present danger of harm to others or herself. 50 P.S. §7301(a). Thus, the Hospital determined that there was insufficient evidence to establish that Mrs. Albright was a clear and present danger to herself or others as of December 22. Nevertheless, the Hospital suggested that Mr. Albright attempt such a §302 involuntary emergency examination. This suggestion was rejected by Mr. Albright.

Thus, far from ignoring Mrs. Albright, the Hospital solicited information concerning her condition and exercised its judgment as to what course of action was appropriate at that time. Based upon the information in the possession of the Hospital, which was devoid

of any evidence that Mrs. Albright presented a clear and present danger to herself or others due to her mental condition or smoking habits, and in light of the applicable statutory requirements, the lower courts found that the conduct of, and the judgment exercised by the Hospital did not, as a matter of law, rise to the level of gross negligence.

With the above stated definition of gross negligence in mind, that is, that the Hospital's conduct had to be flagrant, grossly deviating from the ordinary standard of care, and after reviewing the record as we must in the light most favorable to Appellant, we believe that the lower courts did not commit an error of law or manifestly abuse their discretion in determining that no reasonable jury could have found that the Hospital acted in a grossly negligent manner.[8]

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8 Appellant also argues that Willett v. Evergreen Homes, Inc., et al., supra, is controlling. In Willett, a wrongful death and survival action was brought against a counseling center, two of the center's employees, and Evergreen Homes, a mental health facility after the drowning death of a mentally retarded patient in a bathtub at the facility. The Superior Court affirmed the granting of summary judgment on behalf of the counselling center and its employees pursuant to the limited immunity provision of the Mental Health and Retardation Act of 1966, finding that the conduct of those persons could not be characterized as grossly negligent. The Superior Court noted in dicta that the trial court had denied summary judgment in favor of Evergreen Homes, as the institution knew of the decedent's history of seizures, knew of the importance of monitoring decedent, and yet, left the decedent unattended in the bathtub.

First, the Willett court's analysis of Evergreen Homes' conduct is dicta, and, therefore, is non-precedential. Moreover, the circumstances in Willett are readily distinguishable from the case sub judice. The decedent in Willett was an inpatient under the direct and immediate care, supervision, and control of Evergreen Homes, here, Mrs. Albright was an outpatient living at home. Also, as the decedent in Willett had epilepsy, Evergreen Homes was aware of the immediate need to constantly monitor the decedent's bathing activities, where here, the Hospital had no information on which to believe that Mrs. Albright was a danger to herself or others. Far from being controlling, our review of Willett does not persuade us that the lower courts erred in this matter.

As the Superior Court below opined, at worst, the Hospital's staff exercised poor judgment. We cannot expect those covered by the Act to be soothsayers, and the limited immunity provision of the Act recognizes this understanding. The granting of summary judgment is particularly appropriate here in light of the intent of the Act to provide limited immunity from civil and criminal liability to mental health personnel and their employers in rendering treatment in this "unscientific and inexact field." Fargo v. Sacred Heart General Hospital, 522 Pa. 410, 417, 562 A.2d 300, 304 (1989). The purpose of the Act's immunity provision is to insulate mental health employees and their employers from liability for the very determinations made by the Hospital here.

In summary, we find that the lower courts applied a clear and workable definition of gross negligence, which, for purposes of the Act, constitutes conduct substantially more than ordinary carelessness, inadvertence, laxity, or indifference; that is, behavior that is flagrant, grossly deviating from the ordinary standard of care. Moreover, we find that when presented with facts that do not meet the definition of gross negligence, as a matter of law, a court may withdraw the factual determination of gross negligence from the jury and decide the question as a matter of law. Finally, we hold that in the case sub judice, the lower courts did not commit an error of law or manifestly abuse their discretion in determining that based upon the pleadings, reports, depositions, and records, no genuine issue of material fact was presented as to the Hospital's conduct which could be found by a reasonable jury to rise to the level of gross negligence.

Therefore, as we perceive no error of law or manifest abuse of discretion in the lower courts' decisions, the Superior Court's order affirming entry of summary judgment in favor of the Hospital is affirmed.

Mr. Justice Zappala concurs in the result.
Mr. Justice Nigro files a dissenting opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOHN W. ALBRIGHT, AS EXECUTOR OF THE ESTATE OF ELIZABETH JEAN ALBRIGHT AND INDIVIDUALLY IN HIS OWN RIGHT, Appellant,	:	No. 31 Eastern District Appeal Docket 1996
v.	:	Appeal from the Order of the Superior Court entered November 22, 1995, at No. 648 Philadelphia 1995, Affirming the Order of the Court of Common Pleas of Montgomery County entered February 8, 1995, at Civil Division, No. 89-18657.
ABINGTON MEMORIAL HOSPITAL AND MONTGOMERY COUNTY EMERGENCY SERVICES, Appellees.	:	ARGUED: October 17, 1996.

DISSENTING OPINION

MR. JUSTICE NIGRO DECIDED: June 17, 1997

I disagree with the majority's determination that, as a matter of law, no reasonable jury could have found the Hospital acted in a grossly negligent manner. Because this case is not entirely free from doubt and should have been presented to the jury, I believe Appellant has presented sufficient facts to support a finding of gross negligence on the part of the Hospital. Accordingly, I dissent.

Summary judgment may be granted only in those cases where the right is clear and free from doubt. In a motion for summary judgment, the moving party has the burden of proving the nonexistence of any genuine issue of material fact. Further, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material

fact must be resolved against the moving party. Marks v. Tasman, 527 Pa. 132, 134-135, 589 A.2d 205, 206 (1990)(citations omitted).

Instantly, the majority adopts the definition of grossly negligent as articulated in Bloom v. DuBois Regional Medical Center, 409 Pa.Super. 83, 597 A.2d 671 (1991) and finds the question of whether the Hospital acted in a grossly negligent manner was properly removed from the jury's consideration. In Bloom, the Superior Court defines gross negligence as conduct found to be flagrant, grossly deviating from the ordinary standard of care.[9] Bloom leaves open the controlling question of whether the judge or jury should make the determination as to what constitutes "flagrant." Here, the majority suggests the question was clearly for the judge as a matter of law. I disagree.

The Bloom court stated whether an act or failure to act constitutes negligence, of any degree, when viewing all the evidence is a determination for the jury and may be decided as a matter of law only when the case is entirely free from doubt, with no possibility that a reasonable jury could find negligence. Bloom at ---, 597 A.2d at 679-680 (citations omitted). The majority interprets that language and finds that the determination of whether an act constitutes gross negligence is for a jury. However, when the case is entirely free and clear from doubt, it may be removed from the jury and decided as a matter of law. However, this case is not entirely free from doubt and the trial judge's finding of no gross negligence as a matter of law was an abuse of discretion and in conflict with the majority's interpretation of Bloom.

In this matter, Appellant has presented sufficient facts to present this case to the jury. Specifically, Appellant asserted that the Hospital ignored warnings of Mrs. Albright's deteriorating mental

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9 The definition of flagrant is extremely or deliberately conspicuous; notorious; shocking. The American Heritage Dictionary of the English Language (Second Printing 1969).

condition after being informed of her manic state by Mr. Albright, and failed to commit her as an inpatient when she declined to follow up her missed December appointment. Further, Mr. Albright informed the hospital that Mrs. Albright was not taking her medication and missed her last appointment. He told the Hospital that she had a breakdown and was becoming manic, walking around at night. He also indicated Mrs. Albright was chain smoking and that there were some cigarette burns on the couch. In response, the Hospital did not believe there was sufficient time to attempt an involuntary commitment as Mrs. Albright was in the 85th day of a 90-day outpatient treatment. Further, the Hospital believed that an emergency commitment was unsupportable.

When viewing those facts in a light most favorable to Appellant as the non-moving party, the question of whether the Hospital's conduct was flagrant or grossly negligent should have been left to the province of the jury, not the judge. The Superior Court below suggests that this case is at worst simply an exercise of poor judgement by the Hospital staff. However, I believe the jury should have been afforded the opportunity to make that ultimate decision.

FILED
OCT 17 1997
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No. 97-498

In The

Supreme Court of the United States

October Term, 1996

ANNE L. ALLEN a/k/a NANCY ALLEN, an incompetent, by WALTER E. ALLEN and ANNE M. ALLEN, her guardians and WALTER E. ALLEN and ANNE M. ALLEN, in their own right,

Petitioners,

vs.

MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT PAUL R. CASEY, JR., M.D.

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QUESTIONS PRESENTED FOR REVIEW

1. Are persons hospitalized for treatment of mental illness members of a suspect class for equal protection analysis?

2. Is there a fundamental constitutional right to recover damages for all personal injuries caused by simple negligence?

3. Is the right to equal protection of the laws violated because a hospitalized mentally ill person may not recover damages for personal injuries resulting from decisions pertaining to the use of restraints or supervision, absent proof of gross negligence or wilful misconduct?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions quoted in the Petition for Writ of Certiorari, the following statutory provision is relevant to this action:

50 Pa. Stat. Ann. § 7103

Scope of act

> This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. "Inpatient treatment" shall include all treatment that requires full or part-time residence in a facility. For the purpose of this act, a "facility" means any mental health establishment, hospital, clinic, institution, center, day care center, base service unit, community mental health center, or part thereof, that provides for the diagnosis, treatment, care or rehabilitation of mentally ill persons, whether as outpatient or inpatients.

STATEMENT OF THE CASE

Petitioner, Anne L. Allen, also known as Nancy Allen, was transferred to Montgomery Hospital on November 30, 1982, from Norristown State Hospital, an in-patient mental health facility. On December 5, 1982, she was somehow able to slip her arms out of a Posey restraint. Ms. Allen was found by a nurse, out of the bed, with her legs from the knees down on the

floor, but otherwise suspended approximately six (6) inches above the floor. (R. 155a-167a[1]). It was alleged that she suffered permanent brain damage as a result. (R. 20a).

Ms. Allen was a patient at Norristown State Hospital, located in Montgomery County Pennsylvania, outside of Philadelphia. She was suffering from mental retardation and psychosis. (R. 194a, 212a, 391a). Prior to her admission to Montgomery Hospital she had been placed in a locked room at Norristown State, in which she fell down and injured herself. (R. 335a-336a). She was transferred to Montgomery Hospital by ambulance, on a stretcher. (R. 190a, 198a).

At the time of her arrival Ms. Allen was screaming and suffering with a fever and dehydration. She had a very large bruise on her right hip. (R. 133a, 182a, 201a). She was unable to communicate (R. 199a, 391a), but was accompanied by records from the State Hospital. Those documents showed that Ms. Allen was first admitted to Norristown State Hospital on October 10, 1969. At the time of her transfer to Montgomery Hospital she was suffering from dehydration, the inability to swallow, muscular rigidity, loss of balance, elevated heart beat and blood pressure, and an electrolyte imbalance. (R. 191a-192a). Her history showed that she was a profoundly mentally retarded and psychotic patient (R. 194a), who was suffering from agitation, falling on attempting to walk, and sliding out of chairs. Her medications were Benadryl, Lithium, Serentil and Vistaril. (R. 192a-193a).

Montgomery Hospital has a written transfer agreement with Norristown State Hospital to deal with illnesses and injuries suffered by Norristown State's mental patients. Respondent, Paul R. Casey, Jr. is one of the internists listed in that agreement

1. "R." refers to the Reproduced Record filed in the Supreme Court of Pennsylvania.

who provide medical care to the Norristown State patients. (R. 175a-180a).

The symptoms presented by Ms. Allen were typical of those seen by the internists at Montgomery Hospital in patients transferred from Norristown State. One or more Norristown State Hospital patients a week are presented at Montgomery Hospital suffering from fever and dehydration. (R. 306a-307a, 378a-379a).

Dr. Casey attended Ms. Allen at the emergency room upon her admission. (R. 134a, 174a). She was dehydrated, had an elevated fever, was screaming, and her body had bruises indicating trauma. (R. 181a-182a, 372a-373a). Following his examination and review of Ms. Allen's physical and mental history, Dr. Casey ordered a course of treatment to rehydrate her, treat her for a urinary tract infection until infection could be ruled out, and treat her for drug toxicity. (R. 203a, 333a, 372a-375a).

Dr. Casey ordered fluids, antibiotics, and discontinued all the psychotropic medication but the Vistaril. Dr. Casey testified that Ms. Allen's age and symptoms indicated the possibility of a urinary tract infection, and that the major psychotropic medications and the Lithium all could cause dehydration, muscular rigidity, difficulty swallowing, and falling. He decided to continue only the medication he considered safe, Vistaril, which is used to control agitation. (R. 220a-222a, 227a, 373a-377a).

As the result of the withdrawal of the psychotropic medications Lithium and Serentil, Ms. Allen's condition improved. (R. 234a-235a, 352a, 384a, 388a). While her episodes of agitation continued, they became less frequent. (R. 235a, 344a).

Although Dr. Casey did not order the Posey restraint himself, he observed its use on Ms. Allen and approved its continuation (R. 237a, 385a) to protect her from the consequences of the intermittent agitation from which she suffered on admission, and continued to suffer throughout her hospitalization at Montgomery. (R. 192a, 241a, 261a, 320a-322a, 384a-385a). Dr. Casey's concern was with all aspects of Ms. Allen's health, both mental and physical. He did not separate the treatment or the use of the restraint between one condition or the other. (R. 384a-385a, 388a).

Due to her mental condition, Ms. Allen was unable to communicate her problems to Dr. Casey. (R. 199a, 391a). Dr. Casey regarded the use of the Posey restraint as appropriate to prevent Ms. Allen from doing further injury to herself. (R. 379a). Neither Dr. Casey nor his partner saw any need for more than the usual degree of supervision. (R. 233a, 310a). Defendants' experts offered testimony that there was no need for private duty nurses nor for one-on-one supervision. (R. 324a, 351a).

There was evidence offered on behalf of plaintiffs-petitioners that greater restraint than provided by a Posey restraint was required, and that more supervision was indicated. Plaintiffs asserted that the defendants failed to comply with statutes, regulations, and other applicable standards. The jury was charged concerning those standards and requirements. (R. 404a-405a, 414a-418a). The jury found that neither Dr. Casey nor Montgomery Hospital was grossly negligent. (R. 428a).

REASONS FOR DENYING THE WRIT

I.

THE QUESTION STATED BY PETITIONERS IS NOT PRESENTED BY THE FACTS OF THIS CASE, NOR BY THE STATUTE THEY CHALLENGE.

The petitioners assert that § 114(a) of the Pennsylvania Mental Health Procedures Act, 50 Pa. Stat. Ann. § 7114(a), violates the Equal Protection clause of the Fourteenth Amendment. This statute provides:

> In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, *a physician*, a peace officer or any other authorized person *who participates in a decision that a person be examined or treated under this act*, or that a person be discharged, or placed under partial hospitalization, outpatient care or leave of absence, *or that the restraint upon such person be otherwise reduced*, or a county administrator or other authorized person who denies an application for voluntary treatment or for involuntary emergency examination and treatment, shall not be civilly or criminally liable for such decision or for any of its consequences. [emphasis added].

This is part of Pennsylvania's Mental Health Procedures Act of 1976, a comprehensive statute regulating hospitalization and treatment of the mentally ill.

50 Pa. Stat. Ann. § 7103, quoted above, limits the

applicability of the Act to mentally ill persons who are hospitalized, whether voluntarily or involuntarily, and to persons receiving treatment involuntarily without regard to where their treatment takes place. This case, therefore, does not, and cannot, involve the rights of *all* mentally ill persons. Nancy Allen was subject to the immunity provisions of 50 Pa. Stat. Ann. § 7114(a) only because she met the criteria for inpatient mental health treatment, and was in fact hospitalized.

Although the Pennsylvania Supreme Court in this case, *Allen v. Montgomery Hospital*, __ Pa. __, 696 A.2d 1175, 1179 (1997), applied the statute broadly to cover all medical care coincident to mental health care, the facts fall within the narrowest reading of the statute. This case involves a decision about the degree of physical restraint used on Ms. Allen. The basis upon which Dr. Casey's liability was predicated by petitioners was that he should have prescribed greater restraints than were used, and directed more supervision. The parties to this case therefore have no interest in the broadly stated question that the petitioners present concerning all medical treatment given to all mentally ill persons.

Petitioners' equal protection analysis is necessarily faulty because they are dealing with an exaggerated class applied to hypothetical medical malpractice liability. Petitioners also analyze this "immunity" provision of the Pennsylvania Mental Health Procedures Act in a vacuum. The analysis is different when this section is considered in the context of the entire Act.

The statute that preceded the Mental Health Procedures Act of 1976 is the Mental Health and Mental Retardation Act of 1966. 50 Pa. Stat. Ann. § 4101 *et seq.* That statute came under attack in the legislature and the courts by advocates for the mentally ill in the 1970's. In *Dixon v. Attorney General of Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa.

1971), the District Court held that the provisions of that statute pertaining to the continuing commitment of mentally ill persons confined because of criminal charges or convictions violated their rights to due process of law. On July 8, 1976, the same court, in *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976), held that the provisions of the statute providing for the involuntary and indefinite commitment of persons in need of care and treatment because of their mental disability, was vague and overly broad. The *Goldy* decision moved the pending legislative reforms forward rapidly.

On the following day Pennsylvania enacted the Mental Health Procedures Act of 1976, 50 Pa. Stat. Ann. § 7101 *et seq.* Article I of the Act contains general provisions. These include a statement of the purpose of insuring the availability of adequate treatment to persons who are mentally ill. 50 Pa. Stat. Ann. § 7102. Another section, 50 Pa. Stat. Ann. § 7104, *requires* adequate treatment designed and administered to alleviate pain and distress, and to maximize the probability of recovery. "Adequate treatment" is defined in that section to involve a number of services, including medical care.

50 Pa. Stat. Ann. §§ 7106 and 7107 require the formulation of treatment plans, and 50 Pa. Stat. Ann. § 7108 requires an examination of the patient and a review of the plan every thirty (30) days. Records are made confidential, beyond what is mandated by Pennsylvania's physician-patient privilege. 50 Pa. Stat. Ann. § 7111. The "immunity" provision involved in this case, which limits liability to cases of willful misconduct or gross negligence, is contained in 50 Pa. Stat. Ann § 7114.

Article II of the Act, 50 Pa. Stat. Ann. § 7201 *et seq.*, deals with the authorization, review and patient's revocation of his or her consent to voluntary treatment. Article III deals with involuntary examination and treatment. Involuntary treatment,

whether inpatient or outpatient, may be imposed only on persons who are severely mentally disabled and in need of immediate treatment who present a clear and present danger to themselves or others. 50 Pa. Stat. Ann. § 7301(a). The balance of Article III mandates short time limits for involuntary commitment, and provides for continuing periodic review by judicial officers.

The last article, Article IV, applies to persons charged with crimes or serving sentences. It is Pennsylvania's statutory law concerning competence to proceed to trial, and addresses the treatment of persons acquitted for lack of criminal responsibility.

In *Allen v. Montgomery Hospital*, __ Pa. __, 696 A.2d 1175 (1997), the Pennsylvania Supreme Court viewed the "immunity" provision in the context of the entire statute, and found, correctly, that the limitation of a medical practitioner's liability to hospitalized mentally ill patients serves the purposes of insuring adequate treatment, and encourages health care practitioners to provide services to these more difficult to treat patients. In this case the difficulty was compounded by Nancy Allen's inability to communicate her problems to Dr. Casey. (R. 199a-391a). Not all hospitalized mentally ill persons suffer from such a degree of communication difficulty, but by definition the seriously mentally ill have a different perception of reality than the rest of us. This compounds the treatment difficulties recognized by the Supreme Court of Pennsylvania, and justifies the higher burden of proof to recover damages.

II.

THIS COURT HAS STATED ON NUMEROUS OCCASIONS THAT STATUTES THAT DEAL WITH THE CLASS OF MENTALLY ILL PERSONS ARE ANALYZED ONLY UNDER THE RATIONAL BASIS TEST.

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court was concerned with zoning restrictions requiring a special use permit for the operation of a group home for the mentally retarded. The Court analyzed when each of the levels of equal protection review is employed. The Court held that heightened review is inapplicable when a group affected by a law has distinguishing characteristics relevant to the interest the state has authority to implement. This Court declined to apply more than rational basis analysis to "the large and amorphous class of the mentally retarded". 473 U.S. at 445. The Court compared them to other similar groups including the mentally ill. 473 U.S. at 445-446.

In *Heller v. Doe*, 509 U.S. 312 (1993), this Court also addressed a challenge to the use of differing statutory standards for the commitment of the mentally retarded and for the mentally ill. The Court noted that it has applied rational basis review in previous cases involving both the mentally retarded and the mentally ill. 509 U.S. at 321.

Youngberg v. Romeo, 457 U.S. 307 (1982), involved the rights of committed mentally retarded individuals to safe conditions of confinement, to freedom from bodily restraints, and to training and habilitation. While the Court found that the mentally retarded (and, we assume, the mentally ill) have the right to freedom from improper bodily restraints, the test of validity is only to make certain that professional judgment was in fact exercised. 457 U.S. at 319-322, 324. The jury in this

case applied much greater scrutiny. It assessed the professional judgment of Dr. Casey and found that it did not fall to the level of gross negligence.

Petitioners suggest that *Rohmer v. Evans*, __ U.S. __, 64 U.S.L.W. 4353, 116 S. Ct. 1620 (1996), somehow changes this result. We begin with the observation that *Rohmer* was decided on May 20, 1996, and petitioners' brief was filed in the Supreme Court of Pennsylvania by September 5, 1996, thus depriving the Supreme Court of Pennsylvania the opportunity to consider this aspect of the constitutional challenge. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Rohmer applied a rational basis analysis to a Colorado constitutional amendment that infringed the fundamental rights of gays and lesbians to participate in the political process, and to obtain statutory protection beyond that afforded by the Constitution. This Court found that the amendment had no rational basis, and appeared to be motivated only by animus.

The statute in this case is nothing like that. It is part of a comprehensive act dealing with the treatment of hospitalized mentally ill persons. It defines and requires adequate treatment. It limits strictly the grounds for involuntary treatment, and the time for which involuntary treatment may last. The mentally ill have not been excluded from the political process in Pennsylvania. They are protected not only by the Mental Health Procedures Act, but by Pennsylvania's Human Relations Act. That statute includes mental impairment in the definition of handicaps and disabilities. 43 Pa. Stat. Ann. § 954(p) and (p.1). 43 Pa. Stat. Ann. § 955(a) through (g) prohibit discrimination on the basis of non-job related handicaps or disabilities in all aspects of employment. 43 Pa. Stat. Ann. § 955(h) and (i) prohibit housing discrimination on the basis of any handicap or disability.

III.

THIS COURT HAS NOT FOUND THAT THERE IS ANY RIGHT TO SUE FOR DAMAGES WHEN PERSONAL INJURIES ARE CAUSED BY NEGLIGENCE, MUCH LESS THAT THE RIGHT IS FUNDAMENTAL.

Petitioner speaks of a fundamental right to sue for damages, but cites no decision of this Court that establishes such a right. There is none. *See Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985). There, a Pennsylvania statute that granted local governments immunity from medical malpractice claims, while allowing the state to be sued for similar acts of malpractice, was found to violate no federal constitutional provision.

Petitioners cite no case from any Court holding that such a fundamental right exists. To find such a right would call into question workers' compensation laws, no-fault automobile insurance laws, and efforts on both the state and federal level to reform the medical malpractice system. The creation and abolition of causes of action in tort are matters of state law. *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 52 (3d Cir. 1985).

The statute in question does not impinge on any fundamental right.

CONCLUSION

The question raised in the Petition for Writ of Certiorari is not presented by the facts of this case, nor by the statute at issue. No suspect classification is implicated. No fundamental right is involved. While this case is important to the parties, it does not merit the time of this Court.

Respectfully submitted,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT MONTGOMERY HOSPITAL

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QUESTION FOR REVIEW

Whether the Supreme Court of Pennsylvania properly determined that the limited immunity accorded those that provide adequate treatment to the mentally ill, pursuant to the Pennsylvania Medical Health Procedure Act, 50 P.S. §7171, et seq., does not violate any constitutional right?

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October Term, 1996

ANNE L. ALLEN, a/k/a NANCY ALLEN,
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in her own right and as personal
representative of WALTER E. ALLEN,
her deceased husband,

Petitioners,

vs.

MONTGOMERY HOSPITAL and
PAUL R. CASEY, JR., M.D.,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENT MONTGOMERY HOSPITAL

STATEMENT OF JURISDICTION

This Honorable Supreme Court has jurisdiction of the instant petition and brief in opposition thereto pursuant to 28 U.S.C. §1257(a).

ADDITIONAL STATUTORY PROVISION

Section 104 of the Pennsylvania Mental Health Procedures Act:

> Adequate treatment means a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness. It shall be provided to all persons in treatment who are subject to this act. It may include in-patient treatment, partial hospitalization, or out-patient treatment. Adequate in-patient treatment shall include such accommodations, diet, heat, light, sanitary facilities, clothing, recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions.
>
> Treatment shall include diagnosis, evaluation, therapy, or rehabilitation needed to alleviate pain and distress and to facilitate the recovery of a person from mental illness and shall also include care and other services that supplement treatment and aid or promote such recovery.

Pa. Stat. Ann. tit. 50, §7114(a) (supp. 1997).

COUNTERSTATEMENT OF THE CASE

Procedural History.

Petitioners challenge provisions of the Pennsylvania Mental Health Procedures Act, 50 P.S. §7101 et seq, that provide for limited immunity from suit to professionals rendering "adequate treatment" to mentally ill individuals as mandated by the Act. The limited immunity, provided for in §114 of the Act, 50 P.S. §7114, requires a minimum finding of gross negligence in order to establish liability on the part of professionals rendering such care.

The Court of Common Pleas of Montgomery County, Pennsylvania, determined that the gross negligence standard provided for in §7114 should apply to this case and also considered and ruled against plaintiffs' constitutional equal protection argument. (A.46-50a[1]). At

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[1]All page references preceded by "A" refer to the Appendix to the petition opposed by respondent. All page references preceded by "R" refer to the record before the

trial the jury did not find any gross negligence.

On appeal, a majority of the Pennsylvania Superior Court found that the gross negligence standard should not apply to the facts of the case and did not reach the equal protection issue. Dissenting, the Honorable John G. Brosky concluded the immunity provisions of the statute were constitutional. (A.38-42a).

In its June 17, 1997 opinion and order, the Pennsylvania Supreme Court, by a majority of five to one justices, reversed the Superior Court and, in addition to finding that the trial court had properly applied the gross negligence standard to this case, found that petitioners' equal protection arguments had no merit. (A.9a).

Facts.

On November 20, 1982, Montgomery Hospital admitted appellee Nancy Allen through its emergency room, where appellant Dr. Paul R. Casey attended to her.

Pennsylvania Supreme Court.

Appellee, suffering from a fever and dehydration, was an "urgent transfer" from Norristown State Mental Hospital, where she had been an in-patient since 1980. (R.182a, 186a, 188a, 200a, 260a). She was admitted pursuant to an agreement whereby Montgomery Hospital provided medical treatment to Norristown State Mental Hospital patients requiring medical attention. (R.11a, 177-78a, 180a).

Appellee was being treated at Norristown State Mental Hospital for "severe medical retardation profound with psychosis." She had little cognitive function. She was incoherent. She was not oriented to person, place or time. She was incapable of understanding or consenting to her treatment. (R.194-95a, 213a). Her history at Norristown State Mental Hospital included intermittent bouts of agitation and of trying to walk and falling, as well as sliding out of chairs. (R.192a, 211a, 220a, 252a). She had been kept there in a locked room where she had fallen

down repeatedly. She was bruised, and her enzyme levels reflected substantial muscle damage. (R.334-36a, 373a).

There was reason to believe that appellee's immediate difficulties, including her agitation, were caused by the various psychiatric drugs administered to her at Norristown State Mental Hospital. (R.220-22a, 226-27a, 250a, 333-34a). Indeed, her condition was usual for patients sent from Norristown State Mental Hospital. (R.306a-307a, 378-379a).

Appellant, Dr. Casey, who with his staff had experience treating mental patients, took over management of the drugs that had been prescribed for appellee at Norristown State Mental Hospital, removing all except Vistaril, which was to be administered as needed for agitation. He approved the use of a posey restraint when it was initiated by the nursing staff as a therapeutic and safety measure for appellee. He regarded appellee as a short term patient who he hoped could be returned to

Norristown State Mental Hospital quickly. (R.204a, 228-29a, 236-37a, 247-48a, 250a, 261a, 305a, 312a, 335a).

Since appellee was not experiencing severe psychiatric symptoms such as hallucinations or suicidal tendencies, the doctor saw no need for a psychiatric consultation. (R.223a, 233a). Like other psychiatric patients in need of acute medical care, appellee was admitted to a medical floor of Montgomery Hospital. (R.126a, 246a).

Appellee wore the posey restraint most of her stay at Montgomery Hospital until December 5, 1982. The purpose of the restraint was to prevent her from injuring herself. (R.126a, 246a). The vest-like garment allowed her to be secured to her bed to prevent her from falling out of it but also afforded her the ability to sit up and adjust her body position. The restraint is commonly used for patients who are permanently or temporarily psychotically disoriented. (R.240a, 253-56a).

The restraint was removed from appellee so that she could be accompanied to the bathroom, cleaned up when she soiled herself or was washed or bathed, or otherwise received special care. (R.125a, 148a, 199a, 234a, 236a, 257a, 258a, 262a, 263a, 264a, 266a).

As a result of the administration of Vistaril and the posey restraint, together with the medical treatment provided to her at Montgomery Hospital, appellee's condition improved and she was scheduled to be transferred back to Norristown State Mental Hospital on December 7, 1982. (R.239a, 259a).

However, in the early morning hours of December 5, 1982, appellee managed to partially remove the posey restraint and fell between the mattress and guard rails of her bed, suspending herself above the floor by her own weight with part of the restraint cutting off her oxygen. She weighed 175 lbs., and the nurse who found her required assistance to free her from this position. (R.159-

67a, 168a, 198a, 325a). Although the hospital staff saved appellee's life, she suffered brain damage.

At trial, appellants presented no fewer than four expert witnesses who testified inter alia that the use of the posey restraint on plaintiff was entirely appropriate. (R.282-88a, 320-21a, 363-64a, 335-36a).

The Pennsylvania Supreme Court Decision.

In its decision determining that the gross negligence standard of 50 P.S. §7114 properly applied to this case, the Pennsylvania Supreme Court also found, analyzing the issue under Pennsylvania law, that the constitutional challenge of petitioners was without merit. (A.9a, n.7).

The court noted that equal protection does not prohibit classifying certain persons and classes of persons differently than others and stated:

> The mentally ill require more specialized or intensive care than the non-mentally ill. In order to protect the mentally ill and provide them with adequate treatment in the least restrictive manner, the General Assembly enacted the MHBA. Absent willful misconduct or gross negligence, the General Assembly provided immunity to health care providers of the mentally ill in order to ensure that this important government interest is met. Thus, the limited restriction on the right to sue in the MHBA there is a reasonable relation to a substantial government interest.

REASONS FOR DENYING THE WRIT

1. The Writ Should Be Denied Because The Partial Immunity Provisions Of The Pennsylvania Mental Health Procedures Act Do Not Deny Petitioners Their Rights To Equal Protection Under The Law Because They Are Rationally Related To A Legitimate Statutory Purpose.

Petitioners argue that this Honorable Supreme Court should grant the instant petition because petitioner patient has been deprived of one or more fundamental rights by the immunity provisions in question or, alternatively, either because she is otherwise entitled to strict scrutiny or to heightened scrutiny or because the immunity provisions are not rationally related to a legitimate legislative end.

Petitioners' position is utterly without merit, and their petition should be denied by this Honorable Supreme Court.

Statutory Scheme And Intent Of The PMHPA.

The Pennsylvania Mental Health Procedures Act ("PMHPA"), 50 Pa.C.S.A. Section 7101 et seq., whose

partial immunity provision petitioners attack, is in pertinent part a remedial statute. Its purpose is to guarantee mental patients in Pennsylvania treatment for their illnesses and to insure that it is administered with few restrictions:

> It is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill.... Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed.

50 P.S. Section 7102.

The provision of §7102 for treatment consistent with the least restrictions is designed to eliminate the often brutal long term warehousing and wholesale mistreatment of mental patients that has sometimes been the subject of cases adjudicated by this Court. See, e.g., Youngberg vs. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

In order to leave no question as to its humane intent, the statute defines "adequate treatment" in section

7104 (fully quoted above), as including the provision to mental patients of care to relieve pain and distress, medical care, and "care and other services that supplement treatment and aid or promote such recovery [from mental illness]." 50 P.S. §7104.

This Court has noted that the provision of such care necessitates high cost on the part of a state. Pennhurst State School & Hospital vs. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981).

The immunity provisions of the act that petitioners attack here further advance its humane intent by guaranteeing those who render crucial decisions regarding treatment of the mentally ill and/or administer care to them that they will have partial immunity from suit. Section 7114 of the act provides that, except for instances of willful misconduct or gross negligence, a care giver under the act "shall not be civilly or criminally liable..."

Section 7114 reduces a chronic cause of abuse to

the mentally ill, namely their subjection to physical restraints for long periods so as to control unpredictable behavior sometimes harmful to themselves or others.

The relationship between §7114 and the statutory goal of providing mental patients with adequate care is thus to relieve professional care givers from the risk of liability for negligence resulting in harm to the patients they treat or to third parties harmed by those patients. Eased restrictions in providing patients with adequate treatment result in part from elimination of legal penalties for good faith decisions.

In the case at bar, the Pennsylvania Supreme Court properly found that the immunity provisions of the act applied to respondents because their rendering of medical care to the mentally ill petitioner, which resulted in curing her of the serious complaints she presented on her admission to respondent hospital, "facilitate[d] the recovery of petitioner from mental illness" pursuant to

§7104 of the act. The application of the posey restraint, which was applied for the short duration of petitioner's stay to make sure she did not harm herself as she had at the mental hospital by trying to walk and falling down--and to ensure she had the required bed rest to speed her recovery, was part of her adequate treatment by respondents.

The Law Governing State Created Immunities

This Honorable Supreme Court determined long ago that states have an almost unfettered ability to create statutory immunities so long as they are rationally related to a legitimate state purpose. In Martinez vs. State of California, 444 U.S. 277, 100 S.Ct. 552, 62 L.Ed.2d 481 (1980), the survivors of a 15-year-old girl tortured and murdered by a parolee from state prison brought suit seeking damages against the state officials who were responsible for the parole of her killer. The actions of the officials were alleged to be negligent, reckless, willful,

wanton and malicious, and plaintiffs sought compensatory and punitive damages of $2 million. Id., at 280, 556.

Defendants relied upon the provisions of the California Government Code providing complete immunity to California state entities and employees for civil suits arising from injuries as a result of parole determinations, and the California courts determined that the statutory immunity applied.

This Court, ruling on the issue of whether the Fourteenth Amendment invalidated the California statute granting defendants absolute immunity, found that it did not do so.[2] Considering the immunity provisions as interfering with a possible property interest--the right of action against defendants, the Court stated:

> [E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in

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[2]The Court in Martinez did not have an equal protection claim before it. Id., at 282, 557, at n.4. This issue is addressed in detail below.

> fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
>
> We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute." [Footnote omitted.].... Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law.

Id., at 283-84, 557-58, .

The principle of Martinez that a state's interest in fashioning its own tort law is paramount, barring the most exceptional of circumstances--more exceptional than a law giving immunity to officials implicated in enabling the torture and murder of a young girl, has been subsequently

cited with approval by the Court. Logan vs. Zimmerman Brush Company, 455 U.S. 420, 434, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982). Furthermore, that principle has a parallel in this Court's rulings on state court procedures. Patterson vs. New York, 432 U.S. 197, 97 S.Ct 2319, 53 L.Ed.2d 281 (1977) (states normally have power to regulate procedures under which their laws are carried out, except under Due Process challenge where fundamental principle of justice offended); Addington vs. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (federalism requires allowing state commitment procedures to vary so long as they meet a constitutional minimum).

Turning to the immunity provisions of the Pennsylvania Mental Health Procedures Act, it can scarcely be maintained that they are not rationally related to the legitimate purposes of the statute. The statute is designed to insure adequate care for the mentally ill with

few restrictions, and the immunity provisions further this goal by providing care givers a modicum of protection from liability for the unpredictable actions that may follow from a less restrictive kind of attention than frequently given patients in the past.[3]

Accordingly, when the PMHPA is held to the standard of Martinez, respondent Montgomery Hospital submits that it should be found constitutional.

Equal Protection Analysis

Plaintiff argues that the PMHPA violates the Equal Protection Clause of the Fourteenth Amendment. As demonstrated below, however, equal protection analysis yields the same result as application of Martinez discussed above.

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[3]While respondent knows of no basis for the application of the heightened scrutiny standard under an equal protection analysis, as discussed below, the policy of the PMHPA undoubtedly also sets forth a substantial government interest that would meet the test of such scrutiny.

This Honorable Supreme Court recently restated the principles governing equal protection as follows:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons... We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Romer v. Evans, __ U.S. __, 116 S.Ct. 1620, 1627, L.Ed. (1996).

In the case at bar, the only right restricted by the MHPA is the "right" to prosecute a particular cause of action in state court for negligence against respondents. The curtailment of this "right" is the only basis stated in state court proceedings for an equal protection argument.

The "right" to bring a cause of action for negligence is not a fundamental right under the United

States Constitution. The Constitution undeniably protects the rights of citizens to have access to the courts, but--just as undeniably--plaintiff here has had such access, indeed prosecuted her action in the trial court and through two appeals.

Moreover, as noted by the Third Circuit Court of Appeals in Edelstein vs. Wilentz, 812 F.2d 128, 131 (3rd Cir. 1987):

> The Constitution does not create a fundamental right to pursue specific tort actions. States may create immunities which effectively eliminate causes of action, subject only to the requirement that their action not be arbitrary or irrational. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33, 102 S.Ct. 1148, 1155-56, 71 L.Ed.2d 265 (1982); Martinez v. California, 444 U.S. 277, 282 & n. 5, 100 S.Ct. 553, 557 & n. 5. 62 L.Ed.2d 481 (1980); Ferri v. Ackerman, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed. 2d 481 (1980); see also Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc), aff'd sub nom., Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

Petitioners' argue that this case concerns the

fundamental rights established by this Honorable Supreme Court on behalf of mentally retarded patients in Youngberg vs. Romeo, 457 U.S. 307, 102 S.Ct 2452, 73 L.Ed.2d 28 (1982). This argument is misleading. Youngberg concerned the long term treatment of mentally retarded patients in a state institution.

By contrast, this case concerns only claims for damages based upon allegedly negligent short term medical care. The fact that such care involved the administration of modest restraints to enhance petitioner's recovery, with unpredictably tragic consequences, scarcely transforms the case into one involving safety and freedom of movement in Youngberg. Indeed, a greater restriction of petitioner's freedom of movement might have prevented the injury in question.

Equally to the point, as noted above, petitioners have never before stated claims upon these bases. Rather, they have asserted only their alleged right to money

damages for averred negligence on the part of respondents.

Petitioners also make a meritless argument urging treatment of the class of those affected by the PMHSA as suspect and entitled to intermediate scrutiny.

Initially, respondent notes that petitioners err in assuming that the class in question is made up exclusively of mentally ill individuals or even including only relatives who might share in money recovered as a result of alleged negligence by those who benefit from the limited immunity provisions of the act. As noted by the dissenting judge on the Pennsylvania Superior Court, the immunity provisions also affect third parties who are injured by mental patients as a result of the decisions or actions of professional care givers. Thus it is fallacious to assume that only mental health patients form the class petitioners invoke. (A.41a). Indeed, limited immunity would apply even where the injured party is another care giver.

Furthermore, even assuming that the class were

constituted solely of mental patients, petitioners do not and cannot cite any authority for the treatment of mental patients as a suspect class or one entitled to intermediate scrutiny for purposes of equal protection. Suspect classes recognized by the Court arise out of classifications related to race, national origin, and alienage. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed 2d 313 (1985). Heightened scrutiny has been accorded to classes determined by gender and illegitimacy. Id.

As the Court recently noted:

> We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed 2d 313 (1985); Schweiker v. Wilson, supra. [450 U.S. 221, 234, 101 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981)] In neither case did we purport to apply a different standard of rational-basis review from that just described.

Heller vs. Doe by Doe, 509 U.S. 322, 113 S.Ct. 2637,

125 L.Ed.2d 257 (1993).

Heller, which evaluated the equal protection significance of different provisions by a state for the commitment of the retarded and the mentally ill, determined that the distinctions between the statutes were rationally based and therefore constitutional.

Petitioners argue that the Court should accept this case for reasons having to do with the Court's analytical framework regarding equal protection and in the process accord the mentally ill a level of analysis they have not been accorded in past decisions. Respondents believe that the Court's caseload will afford more appropriate opportunities for re-examination of its analytical framework, if appropriate, than a case whose statutorily affected class is greater than simply the mentally ill and whose contested right is the right to bring a cause of action for negligence.

In sum, petitioners have presented no basis for the

application of any standard other than the rational basis standard of Heller and Martinez, supra.

Finally, respondent notes than in each of the three circuit court cases of which it is aware in which state immunity statutes were challenged under the Equal Protection Cause of the U.S. Constitution, the court applied a rational basis examination of the immunity statute and upheld it:

--Grimes vs. Pearl River Valley Water Supply District, 930 F.2d 441, 444 (5th Cir. 1991)(sovereign immunity statute rationally related to legitimate government purpose; class of those injured by political subdivisions not suspect);

--Kranson v. Valley Crest Nursing Home, 755 F.2d 46, 52-53 (1985)(statute precluding medical malpractice or negligence suits against municipally owned nursing homes rationally related to legitimate government state interest; class of patients in municipally operated health care

institutions not a suspect classification, entitlement to monetary damages for negligence never held to be fundamental under Constitution);

--Aubertin v. Board of City Commissioners of Woodson City, 588 F.2d 781 (1978)(law providing for immunity from negligence for road construction and maintenance of counties but not of municipalities rationally related to legitimate state objectives).

Of these cases, Kranson is particularly noteworthy here. The statute at issue addressed those rendering care pursuant to state requirements. The immunity given by the statute, as in the PMHPA, was to negligence suits only. The class was made up of individuals benefiting from care administered by or pursuant to local governments.

In sum, Kranson closely parallels the instant case; and its logic should rule here.

CONCLUSION

For all the above reasons, respondent Montgomery Hospital respectfully requests this Honorable Court to deny the instant Petition for Certiorari.

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(4)

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No. 97-498

In the
Supreme Court of the United States
October Term, 1997

ANNE L. ALLEN, a/k/a NANCY ALLEN, an incompetent, by ANNE M. ALLEN, her guardian, and ANNE M. ALLEN, in her own right and as personal representative of WALTER E. ALLEN, her deceased husband,
Petitioners,

v.

MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

REPLY TO BRIEFS IN OPPOSITION

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1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 6.2 at 591
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REPLY

Pennsylvania's classification does discriminate against the mentally ill.

Respondents (primarily Dr. Casey, but to some extent Montgomery Hospital as well), argue against granting the writ by attempting to blur the classification established by the Pennsylvania statute at issue. They also suggest that the classification does not deserve the attention of this court because it does not affect all mentally ill persons, and because in some cases it affects persons who are not mentally ill. Casey Br. in Opp. at 6, 8; Montgomery Hosp. Br. in Opp. at 23. Although this is clever brief writing, it does not withstand careful constitutional analysis.

It is clear that Pennsylvania's Mental Health Procedures Act (the "MHPA"), as interpreted by that state's highest court, operates to deprive petitioner Nancy Allen (a mentally ill person) of her right to non-negligent medical care and the right to sue therefor, simply by reason of her being subject initially to a MHPA treatment decision. From this (and *Albright v. Abington Memorial Hosp.*, 696 A.2d 1159 (Pa. 1997), argued and decided the same day as this case), it follows that Nancy Allen, and all other persons subject to the MHPA who may in the future require medical care, can only expect substandard medical care. Contrary to respondents' assertions, every single mentally ill person in Pennsylvania (or who may enter Pennsylvania) faces this prospect and is affected by the diminished standards set out by the state supreme court in *Allen* and *Albright*.

Now, it is also true that the MHPA operates to endanger some persons who are not mentally ill.[1] But this additional effect of the MHPA immunity does not take away from the fact that, as applied to petitioners' claims, the MHPA classification discriminates invidiously in violation of the equal protection clause. Petitioners have stated a proper equal protection clause challenge that affects them and the thousands of mentally ill persons in need of medical care now and in the future, whether or not this court decides that the equal protection claims of others are not precisely the same as petitioners, and therefore are better left to another case.

The respondents' statutory arguments do not address the question presented, nor do they narrow the Pennsylvania Supreme Court's broad holding.

Respondent Casey develops this theme and attempts to oppose the breadth of the claim stated by petitioners, and to recharacterize the immunity at issue here, by placing the word in quotation marks and referring to it as a limitation of liability. Casey Br. in Opp. at 6, 8. This latter tack is remarkable, given the vigor with which Dr. Casey argued in the state supreme court for a broad immunity, without the use of quotation marks or other devices, and indeed would seem to be precluded by the doctrine of judicial estoppel. *Callanan Road Imp. Co. v. United States*, 345 U.S. 507 (1953);

[1] To wit, mentally healthy persons who are nonetheless alleged to be eligible for involuntary commitment, as well as third parties (regardless of their own mental health) who may be harmed by mentally ill persons who are negligently released or left unsupervised by a treatment decision under the MHPA.

Michels v. Olmstead, 157 U.S. 198 (1895). Having prevailed below in his statutory construction, he cannot now adopt the opposite theory to defend against the constitutional challenge.

Indeed, the precarious nature of respondents' position is belied by their citation to the "adequate treatment" provisions of section 104 of the MHPA. Casey Br. in Opp. at 7; Montgomery Hosp. Br. in Opp. at 2, 12-13. Given the holdings in *Allen* and *Albright* that the treatment need not really be adequate (nor decent, nor safe, nor healthful -- other standards ostensibly required by section 104), the force of respondents' citation is lost. *Albright v. Abington Memorial Hosp.*, 696 A.2d 1159 (Pa. 1997) (in order to surmount the bar of section 114, patients must prove "more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. . . . The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care."; without this "gross negligence," patient has no recourse). This, of course, sounds most like a statutory interpretation argument, resolved in favor of respondents by the state's supreme court. The federal question properly presented here (and never fully confronted by either respondent) is whether that remarkably broad immunity construction violates the equal protection clause.

The petitioners have always preserved the federal question presented on this petition.

Dr. Casey also relies on *Cardinale v. Louisiana*, 394 U.S. 437 (1969), for the proposition that

the Pennsylvania Supreme Court was "deprived" of "the opportunity to consider this aspect of the constitutional challenge." Casey Br. in Opp. at 10. A closer reading of the three-page opinion in *Cardinale* discloses that Mr. Cardinale "fail[ed] to raise the issue he presents here *in any way below*." *Id.* at 439. This is hardly true of the petitioners here, who have repeatedly raised and pressed their federal claims in every state court which considered the case, beginning with the pre-trial motion in the trial court, as documented in the petition at notes 4-8.

Court of appeals decisions upholding sovereign immunity statutes do not bear on the question presented on this petition.

Both respondents cite *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985), and the hospital further cites *Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441 (5th Cir. 1991), and *Aubertin v. Board of City Commissioners*, 588 F.2d 781 (1978), in support of the idea that state immunity statutes are constitutionally sound. Even apart from the fact that they were not decided by this court, none of the three cases cited address the question presented in this petition. All three cases dealt with state statutes allowing certain municipal actors (two counties and a water supply district), but not others, sovereign immunity from suits by any party. Thus, those statutes did not single out for special harm any class of people -- all citizens who travelled county roads (*Aubertin*), boated near a district dam (*Grimes*), or were patients in a county nursing home (*Kranson*), were equally at risk. Here, by contrast, the MHPA provides to virtually any

actor immunity from suit by the mentally ill, but not others. If a mentally healthy person had presented herself at the Montgomery Hospital emergency room and exhibited the same symptoms, she would have had a right under Pennsylvania law to expect Dr. Casey and the hospital to meet an ordinary standard of care, and if she had received the same treatment from them as Nancy Allen received, she would have had a right to sue them in negligence for breach of their duty to meet that standard. Pennsylvania denies both of those fundamental rights to Nancy Allen and others subject to the MHPA, and this classification denies them the equal protection of the laws in a way that was not at issue in any of the three cases cited by respondents.

The theme of both respondents that states remain free to create and abolish tort recovery is unobjectionable, but also irrelevant to the petition.[2] The petitioners' claim is not that Pennsylvania can or cannot abolish a tort. Their claim is that it denies equal protection of the laws to permit most people to sue for negligence but to deny that right to those subject to the MHPA.

The respondents never address the underlying fundamental right of the mentally ill to safety and medical care presented in this petition.

Dr. Casey several times states, truthfully, that the jury found that respondents were not *grossly*

[2] In addition to *Kranson*, *Aubertin*, and *Grimes*, the hospital cites *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982) and *Martinez v. California*, 444 U.S. 277 (1980), in support of this theme. Both were due process, not equal protection, cases.

negligent. But it must not be forgotten that the jury was prevented from determining whether the respondents were *simply* negligent by the charge to it by the trial judge, who refused to charge on ordinary negligence pursuant to section 114. This is especially important to emphasize in connection with Dr. Casey's citation to *Youngberg v. Romeo*, 457 U.S. 307 (1982), where Dr. Casey suggests that the jury "applied much greater scrutiny" in evaluating whether professional judgment was used. Casey Br. in Opp. at 9-10. Clearly, it did not -- in fact, it was charged that it could not -- which is the whole point of petitioners' challenge. To the extent that respondents rely on *Youngberg*'s language concerning professional judgment, it must be remembered that the statutory vehicle providing a remedy there was 42 U.S.C. § 1983 (1994), with its own requirements applicable to all plaintiffs who seek its remedy. *See* 1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 6.2 at 591 (3d ed. 1997) ("[Section] 1983 itself neither establishes nor creates any rights, but only provides a remedy for the violation of federal rights created by another source, principally some provision in the federal Constitution."). The underlying right recognized in *Youngberg* was therefore not limited to its section 1983 remedy, but was the right to reasonable safety and medical care itself. Here, by contrast, Pennsylvania would allow mentally healthy persons the remedy of holding Dr. Casey and the hospital responsible for their negligent actions, but discriminates against those subject to the MHPA and allows them only substandard treatment and substandard remedies.

The respondents' arguments against the finding of a fundamental right require one additional observation: both respondents attack the existence of a fundamental right to sue in negligence for breach of the duty to provide safety and adequate care, but neither addresses the fundamental right to safety and medical care itself for persons being treated pursuant to the MHPA.[3] There are two fundamental rights (or groups of rights) at issue here: one is the right of the involuntarily committed to medical care, safety, and freedom of movement, as recognized in *Youngberg v. Romeo*, and the second is the preservative right to sue for violations of the first set of rights. The briefs in opposition concentrate their fire on the preservative right, ignoring the fundamental rights underlying it.

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[3] Montgomery Hospital asserts that the right to sue was the only basis for relief set forth by the petitioners in the state courts. Montgomery Hosp. Br. in Opp. at 20. Given that the only way to enforce one's rights is to sue, this seems an odd complaint, but in any event, what petitioners have maintained from the beginning of this controversy is that the application of the MHPA to foreclose their claims violates the equal protection clause of the federal constitution. This is the question presented for review, and the respondents' attempts to distract the court's attention should not be permitted to succeed.

CONCLUSION

For these reasons and those set forth in the petition, petitioners pray that this court issue a writ of certiorari to review this case.

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